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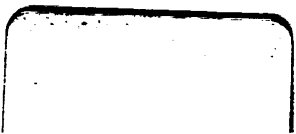
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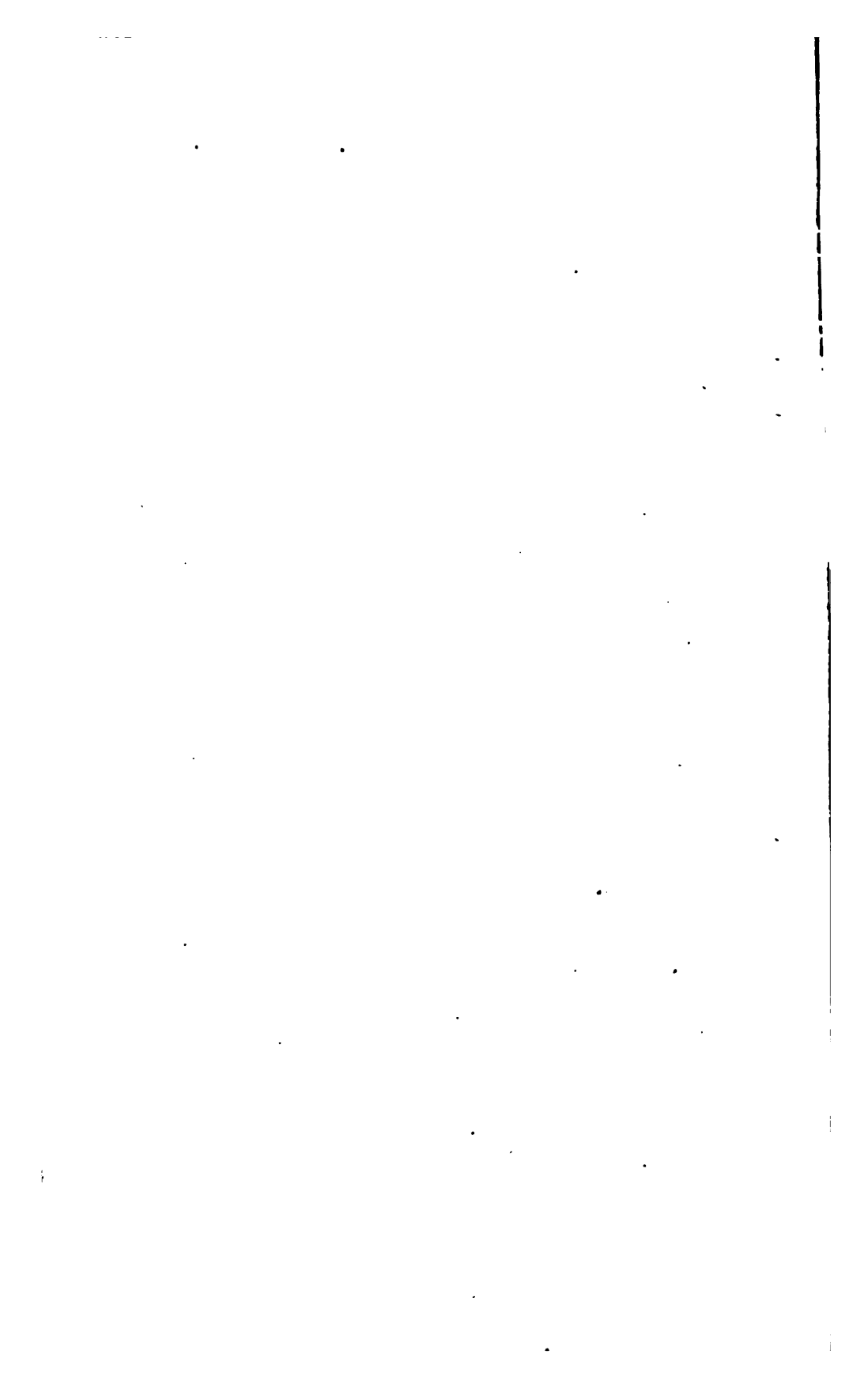
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
District Court of the United States
FOR THE
SOUTHERN DISTRICT OF NEW-YORK.

BY EDWARD R. OLCOTT.

IN ONE VOLUME.

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CASES IN ADMIRALTY.

THE SHIP GREAT BRITAIN.

When a sailor brings a suit *in rem* against a ship to enforce a conditional agreement, made with the master, and outside of the written articles, he will be required to file a stipulation for costs in the same manner as an ordinary suitor.

Rule 45 of the District Court was intended to give seamen high privileges for the collection of the wages agreed upon for their services; it will not be extended to claims extraneous the contracts for wages.

A cook not allowed to proceed under the rule *in rem* against a vessel to enforce a demand for the *slush* made during a voyage, when that perquisite was not agreed for in the shipping articles. He must give the stipulations exacted in ordinary cases for libellants.

BETTS, J.—A motion was made by the owner of the ship that the libellants be ordered to file the usual stipulation to cover the costs of suit, and that proceedings in the cause be stayed until the order is complied with.

The action was brought by the cook of the vessel to recover the value of the *slush* made on her last voyage, and appropriated by the master to himself as owner, on her arrival in port.

The wages stipulated in the articles (\$16 per month) have been paid the libellant in full, but he avers in his libel that the master agreed to allow him the *slush* in addition to the money wages; and it is insisted in his

The Ship Great Britain.

behalf that his case comes within Rule 45 of this Court, which provides, that seamen suing *in rem* for wages in their own right, and salvors coming into port in possession of the property libelled, shall not be required to give such security (stipulation for costs) in the first instance.

He had brought suit against the master personally on that agreement, and recovered judgment in the Marine Court of this city for \$31, the value of the *slush*, and that judgment has not been satisfied; he is now proceeding against the ship, to render her answerable for the sum, claiming it as part of his wages for the voyage.

The present posture of the case does not demand a decision upon the merits of the claim, but only whether it comes before the Court *prima facie* as a suit for wages, giving the libellant the privilege of carrying it to a hearing without entering into stipulation for costs.

Admitting that the written articles are not conclusive upon the sailor as to the amount of his compensation, and that he may prove by parol an agreement made at the time for the allowance of perquisites or other privileges as part of the recompense for his services, it would not follow that he should be allowed, against the owner, to go into that collateral matter without indemnifying him for costs, if he fails to establish his allegations by proof.

The shipping articles are the first and highest evidence of the liability of the ship. The owner is to be presumed cognizant of that engagement; and if at the termination of the voyage he contests the right of the sailor to that compensation, it is reasonable and equi-

table that the seaman should be allowed to seek the aid of the Court for enforcing it without the condition of giving security for costs. But when he interposes an additional demand not mentioned in the articles, and resting on extraneous evidence, or dependent upon contingencies, the equity of the protection passes to the side of the owner, and he should be indemnified in the controversy respecting such a claim, if it be ultimately shown to be unfounded.

Here is a written contract on the part of the libellant to serve for \$16 per month; that sum has been fully paid him; but he asserts that there was a conditional verbal agreement between him and the master that the vessel's *slush* should belong to him also if he performed his duties satisfactorily. If this is a contract binding on the ship, it is not one the owner must be presumed to have sanctioned, as it appears to have been a verbal arrangement between him and the master aside of the engagement in the articles. It is, moreover, positively denied by the master, and the seaman shows no equity entitling him to prosecute the ship for the claim without giving the stipulation of an ordinary suitor.

The rule was intended to give seamen high privileges in collecting the wages agreed upon for their services, but it was not designed to distinguish them from other suitors in respect to emoluments and advantages arising out of collateral arrangements, and not directly and palpably part of their wages.

Leaving the libellant the opportunity to take the judgment of the Court on his case in respect to his right to recover at all, and also in respect to the liability of the vessel for the amount, I am of opinion

The Steamboat Swallow.

that he is not entitled to hold the ship in arrest upon it, without filing the ordinary stipulation for costs. It is accordingly ordered, that unless the libellant file stipulation for costs, according to the course of the Court, immediately on notice to his proctor of this decision, the ship be discharged from attachment, and that the libellant stand chargeable in the first instance with the expenses of her arrest.

A. Nash, for libellant.

Burr & Benedict, for claimants.

THE STEAMBOAT SWALLOW.

By the well-settled principles of maritime law, where seamen employed for a voyage, or by the month, voluntarily leave the vessel before the termination of the voyage, or the expiration of the time for which they hired, without good cause, or the consent of the master, they will thereby forfeit the wages previously earned.

A party will not be allowed, by tacking a small undisputed claim, upon which he has never made a demand, to a contested claim for wages denied him, to recover costs on the demand denied him.

The principles touching the duties of seamen under a contract of hiring on a sea voyage are binding upon those engaged in the navigation of inland tide waters. A suit for wages cannot be maintained until the contract of service is performed or released.

The testimony of a ship's crew, being joint libellants, each swearing for the other, will be received with great caution. The Court will be more inclined to credit the master of the vessel, when the evidence between them is contradictory and he has no interest in the action.

Full costs will be decreed the claimant, although the demand of the libellants is less than \$50 to each.

Benedict, for the libellants.

Hoffman, for the claimant.

BETTS, J.—The crew of the steamboat Swallow arrested the ship upon a joint libel for wages for half a

The Steamboat Swallow.

month's service on board her upon the North River. She is a large passenger vessel, making daily trips between New-York and Albany. The action is defended, upon the ground that the libellants deserted the vessel, and thereby forfeited their right to wages. The libellants were employed by the month as deck hands on the boat, and the answer charges, that without the consent of the master, or any officer of the boat, they left the ship before the termination of the time for which they had engaged to serve, and as the boat was about leaving this port on her daily trip to Albany.

It is admitted that a claim of Dates, one of the libellants, for \$15, for taking charge of the boat during the winter months, is just, and ought to be paid.

By the well-settled principles of maritime law, where seamen, employed for a voyage or by the month, voluntarily leave the vessel before the termination of the voyage or the expiration of the time agreed upon, without justifiable cause or the consent of the master, they thereby forfeit all wages previously earned.

The libellants, as witnesses each for the other, give evidence tending to show that they were discharged from the boat by the master.

The testimony is met by express denial on the part of the master. His testimony, if believed, is conclusive that the men left the boat in his absence and without his consent.

The law admits a crew to testify on a question for wages for each other, but does not disregard the bias which will naturally influence them to give the case a coloring most favorable to their feelings and interests; and it is to be furthermore noticed, that they are all implicated in the charge of disorderly and mutinous

The Steamboat Swallow.

conduct on board, and that their joint testimony is intended to establish for them a justification of their conduct.

Their evidence, under such circumstances, must be received with great caution.

The boat arrived here from Albany the morning of the day the libellants left her. The day previous, about breakfast time, a fight had occurred in the kitchen and on the deck between the cooks and some of the crew, one Rhind being the ringleader. The other libellants joined Rhind in the affray.

The master joined the boat at Red Hook, on her passage down from Albany, and next morning, on learning the disturbance, he discharged the two cooks and Rhind in New-York.

Their wages were paid to the time of their discharge.

The libellants, to justify leaving the vessel, and to establish their right to wages, attempt, by their own testimony, to prove they were discharged by the master.

Dates says: "That he, in presence of three or four others, asked the master what was to be done; whether they or the black men (cooks) were to go ashore? The master replied, they might every d——d one go ashore, and go to the office for their money."

Deyo says: "He went to the master with *Dates* and asked what was to be done? The master said he would look into the matter, and those who were in fault might go ashore, and those who were not might stay."

Fuller replied: "I am one of them."

Dates said, he, also, had been engaged in the disturbance.

The master said, "he had more trouble than a little with him, and told *Knight* to pay them all off and let

The Steamboat Swallow.

them go," and then the master went away. The witness turned to his work.

Crum testified, that *Dates* asked the master "what he intended to do with the black men?"

The master replied, "he had discharged them, and would discharge all who were concerned with them."

Fuller said, "he was one," and the master ordered *Knight* to pay him off.

Dates said, "he might as well go, too," and the master said, "Let every d——d one of them go."

Sellick gives this account of the occurrence: "*Dates* asked the master what was to be done about the disturbance?" He answered, "he had discharged the two negroes and *Rhind*, and meant to discharge as fast as he found others interested."

Fuller said he was interested, and the master said: "Go to the office and get your money, and every d——d one of you." A number of the crew, he thinks a majority, were there sitting on chairs and boxes near by.

The master testifies, that he ordered the cooks and *Rhind* to be discharged in the morning—at about 11 A. M.—the work on the boat having been done up. The men were sitting about on boxes.

At this time *Fuller* asked what was to be done. He replied, that if any one had any thing to do with the disturbance he would discharge him.

Fuller said he was one.

Witness ordered him ashore, and to go and get his money. The remainder of the crew were dispersed about the boat.

Dates said he had struck the negroes, and the witnesses answered he had done right, and then all the men went to work.

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At about 3 P. M. he first heard the men had left the boat; he directed the pilot to supply their places, but not to take either of those who had left.

The pilot wished to take one or two of them. No one of these men offered to return to duty.

The pilot testified that he tried to dissuade the men from leaving the boat, but they said the master told them they might go ashore.

This rehearsal of the testimony as to the disturbance on the boat and the declarations of the master show that there was no direct discharge of any of the libellants, or any consent on his part to their leaving the ship.

It will be seen that Dates gives a different version of his language from the other witnesses, and confirms the statement made by the master. The libellants asked him what was to be done in regard to the occurrence of the previous morning, and he replied, "that he would look into the matter, and those who were in fault might go ashore."

No other complaint was made against the hands than the particular act of misconduct and disorder at Albany, and the direction, or rather permission, to go ashore and be paid off, was a correction for the fault they had committed. They elected to accept that punishment, and tendered no apology or atonement for their conduct, nor did any one offer to remain with the vessel and perform his duty.

The burden of proof is upon the libellants. They broke their contract, and they must show that they have a clear excuse in law for so doing.

If they were discharged without just cause, they

would be entitled to recover the full amount of the wages for the month ; so, also, if they leave before the time of service for which they engaged has expired, without a legal excuse, they forfeit all wages earned.

In comparing the statements of the libellants themselves with those of the master and pilot, I am satisfied his order or direction to go ashore applied to the men alone who had engaged in the affray on board, and not to *all* the libellants.

The reciprocal testimony of the libellants, each endeavoring to prove a discharge for his fellows, should be received and acted upon with great caution, especially when it stands contradicted by the evidence of the master, and the strong probabilities of the case. It would be a dangerous confidence in evidence, derived from witnesses so circumstanced, to hold that it authorized all these men to abandon the ship, and maintain an action for full wages for the term of their contract, and of mischievous influence to countenance in a crew conduct so disorderly as that pursued by these libellants. For a crew to leave abruptly a large passenger steamer, on the point of sailing, might cause the trip to be lost to the owners, and the travelling community to be greatly inconvenienced, or perhaps the more serious hazard of putting the vessel in the charge of those unskilled and incompetent to her safe management.

This freak on board the boat, in which so much hasty temper was displayed, afforded no excuse to the men for breaking their contract and resorting to an action for future or past wages.

When the parties had come to a cooler consideration, the whole matter might probably have been compromised between them ; the owners, upon a suitable

The Steamboat Swallow.

acknowledgment due on the part of the men, should have overlooked the irregularity and breach of duty which had occurred, and continued them on board with pay for their past services.

The libellants have not chosen to adopt this course; and instead of resorting to a trial by jury before a local Court, where the equities on both sides might have been considered with liberal allowances to both parties, they have chosen to arrest the ship in a Court of Admiralty, and submit their rights to be decided on the principles of the maritime law, and the owners insist their claim shall be judged by the strict rules of that law. By the maritime law, an authorized and deliberate departure by seamen from a ship in the course of a voyage, without intending to return to her, is cause for the forfeiture of antecedent wages earned by them. (*Cloutman v. Dennison*, 1 *Sumner*, 373; 3 *Kent Com.* 198.) But the Court might exercise a discretion in such case, and even if the men were guilty of a wilful desertion, might reduce an absolute forfeiture of wages to a fine or mulct proportionate to the offence. (*The Union*, 1 *Blatch. & How.* 554; *The Lady Campbell*, 2 *Hagg.* 5; *The Malta*, *Ibid.* 168.) These principles embrace maritime services and obligations of seamen employed in coasting, or tide water navigation on rivers, equally as at sea. Under the facts in proof, the libellants had no right to abandon the ship of their own accord, and they fail to show that kind of discharge by the master which would sustain the obligation of the ship to them for their wages. He was justifiable in punishing them for misconduct on board by putting them ashore at their home port; and his direction to them to go to the clerk of the boat and

receive pay for half a month's wages was no recognition of the legal obligation of the ship to them for wages.

So, also, it is to be observed that their hiring was by the month, and both by the Admiralty and the common law, if they leave the service during the month, without justifiable cause, the obligation to pay for past services is destroyed. Dates is entitled to recover the \$15, antecedently due him; but as no proof is given that he ever demanded that money, he will not be allowed now, by tacking it to his other claim, to carry costs.

If there be an equity in his behalf to costs on this demand, the owner would have an equal equity to costs against him on the other, which was the only subject of contestation, and, as far as appears upon the proofs, the only one made known to the owner or master.

The case as to costs will prove a hard one on the libellants, but it was their folly or misfortune to bring an action where they had not sufficient proof to support it.

On the evidence as it stands, I am of opinion that there must be a decree for full costs against all the libellants, except Dates, although the respective demands are below \$50; and that a decree be entered in favor of Dates for the sum of fifteen dollars, without costs.

The Schooner Leonidas.

THE SCHOONER LEONIDAS.

Where the mate, upon the decease of the master, succeeds to the command of the vessel, he cannot sue, *in rem*, for the extra compensation he thus becomes entitled to as acting master.

According to the English and American cases, the mate must sue in the Admiralty as *mate*. His claim for services as *temporary master*, either demanded as additional wages or, as a *quantum meruit*, must be agitated elsewhere. By the well-settled rule in Admiralty, the master of a ship is entitled only to an action *in personam* for the recovery of compensation for his services.

The holder of a bill of lading has a remedy in Admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel *in rem*, where the goods shipped on board are not delivered.

If part of the cargo be sold in a foreign port by the master, to supply the necessities of the ship, the owner of it may be entitled, in case the ship or owners cannot satisfy his demand, to proceed against other owners of cargo to contribute, in proportion to their respective interests, towards his indemnity.

In an action *in rem* against a vessel, the Court cannot take cognizance of collateral equities to enforce them against parties *personally*, not made parties to the proceedings, where such decrees may be prejudicial to their interests.

BETTS, J.—This is an action instituted by two seamen and the chief mate *in rem*, to recover wages due them. The demand by the seamen and the mate in that capacity are not contested. But it is made a point of controversy whether the mate, succeeding to the command of the vessel, can sue *in rem* for the extra compensation he thus becomes entitled to as acting master.

It is admitted the English rule does not allow such recovery in Admiralty, (2 *Rob.* 192; *The Favorite*, 2 *Strange*, 937,) but it is contended that a different principle is sanctioned in this country, and the case of the *Brig George* (1 *Sumner*, 151) is relied upon as establishing that doctrine.

The Schooner *Leonidas*.

This point, however, is not touched in that decision, nor does any principle there decided necessarily embrace it. The mate, in that case, after the command of the vessel devolved upon him, went ashore and received medical treatment, which was paid for by him out of the funds of the ship; that disbursement was set up by the owners as a sum to be deducted from his wages. (1 *Sumner, Appendix.*)

But it does not appear, from the statement of this case in the District or Circuit Courts, that the increased wages due him as master were included in his demand. If they were, no objection was raised to their allowance, the cause proceeding upon the admission of the libellants' account, and only seeking a decision as to the justness of that deduction.

The Court adjudged, that as mate or mariner he was entitled to be cured at the expense of the ship, and that his casual command of the vessel did not deprive him of any of the incidents or privileges appertaining to him as mariner. Judge Story goes further, and intimates that a master is also entitled to be cured at the expense of the ship the same as a mariner.

The last suggestion is advanced only to show that the Court, in adjudging in favor of the libellants, could not be understood to decide, that because he had such privilege, he was entitled to enforce it *in rem*, nothing being now more definitely settled than that a master has no remedy against the ship for his services.

I do not therefore perceive, that the case in Sumner has any relation to the point in question. It rests on considerations and principles entirely distinct from that of the method by which the mate is to collect the compensation he becomes entitled to as acting master.

The Schooner *Leonidas*.

I find no American case that conflicts with the decision of the English Courts. Judge Peters expressly affirms those cases. He says, the mate "must sue in the Admiralty *as mate*, and his wages, as such only, are recoverable here. His claim for services as *temporary master*, either demanded as additional wages or as a *quantum meruit*, must be agitated elsewhere." (*Atkins v. Burns*, 1 *Peters' Ad.* 248, note.)

It is difficult to discover any satisfactory principle for limiting the relief of a master in the Admiralty to an action *in personam*, his services being pre-eminently in the vessel and for her benefit; and his contract is technically with the owners, but ordinarily without any personal knowledge of them or their responsibility—perhaps scarcely less frequently than the engagements of the seamen. The reason suggested in the books—"The presumption is that the mariners who contract with the master, contract with him on the credit of the ship; whereas the master, who contracts with the owners, is presumed to trust to their personal credit"—is by no means universally true as matter of fact, as the employment of a master is as often by a ship's husband, agent or consignee, as by the real owner. They frequently are numerous and widely dispersed; and the ship's papers do not necessarily disclose the names of the actual owners. Whatever may be thought of the principle of the rule, it is not my province to disturb a well-settled doctrine of law, and I do not discover any ground of discrimination upon which a compensation as master can be recovered by a *mate* in a method different from that established in behalf of the master, taking his authority in any other manner than by casual succession. If his action against

The Schooner *Leonidas*.

the owners *in personam* is carried to a decree, the Court may equitably retain any surplus or remnants out of the proceeds of the vessel in Court for its satisfaction, but in this case no such surplus will remain. So much of the libellant's demand as relates to an extra compensation in his character of master must accordingly be disallowed, and the Clerk will report the amount due him for wages, as mate, and also the amount due the other parties suing with him, as co-libellants.

At a subsequent day, upon the coming in of the Clerk's report in this cause, *Mr. Benedict* moved for its confirmation. *Mr. Cutting* opposed the motion, and asked that \$62 75 be deducted from the amount reported due the master.

BETTS, J.—The libellants, Hill and Owen, had a remedy in Admiralty on their bill of lading against the master on his undertaking, or personally against the owners of the schooner, or against the schooner *in rem*, because of the non-delivery of the goods shipped on board. (*Ware's R.* 138; 3 *Kent Com.* 207; *Smith's Mercantile Law*, 175; *Abbott*, 92, 94, 170.) The ship is bound to the merchandise and the merchandise to the ship. (*Cleirac*, 72; *Malpica v. McKown*, 1 *Lou. R.*, 259; *Arago v. Carvell*, 1 *Lou. R.* 539.) And because part of the cargo, their property, was sold in a foreign port by the master to supply the necessities of the ship, the libellants might probably be entitled, in case the ship or owners could not satisfy their demand, to compel the other owners of cargo to contribute in proportion to their respective interests towards his indemnity. (*Ship Rachel*, 3 *Mason*, 255;

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Gratitude, 3 Rob. 240; *The Hoffnung*, 6 Rob. 883; *American Ins. Co. v. Coster*, 3 Paige, 323.)

They brought their action against the vessel alone, and obtained a decree for full compensation out of her proceeds in the registry.

But the ship's crew have since interposed their demand for wages, and that right taking precedence of the shipper's claim, and the proceeds in Court being insufficient to satisfy both, it is now urged that the mate shall be compelled to apply towards his wages the \$62 75, being the surplus of cargo sold and remaining in his hands, or bring that money into Court, to be distributed according to the rights of these libellants.

An action, properly framed, might possibly have commanded a decree conformably to the latter branch of the application. The money in the hands of the mate, as acting master, being part of the proceeds of the libellants' goods, belongs to them; and as against them, in a suit founded on that fact, he could not retain it, to be applied in his accounting with the owners of the vessel.

In an action *in rem* against the vessel, this Court cannot take cognizance of collateral equities, to be enforced against third persons not parties to the suit, and the shape of the case before the Court would accordingly prevent the rendition of a decree against the mate, compelling him to perform an act to his own prejudice and the advantage of the libellants.

This is not mere matter of form. Marthan, the mate, became, by the decease of the master before in command, actual master of the vessel for the completion of the voyage. For this extra service he demands a compensation beyond his wages as mate; and the judgment rendered in this case by the Court admits the validity

of such demand as against the owners, only denying him a remedy *in rem* therefor. The decree accordingly gives him his wages, as mate alone, out of the proceeds of the vessel, and his remedy for his services as master is against the owners personally. In the adjustment of that demand he would be entitled to retain, as against them, any moneys in his hands belonging to them, and the products of the sale of the cargo for the benefit of the vessel, as between them and the mate, is their fund. It is therefore clear, that if, in this mode of proceeding, whether Hill and Owen (the libellants) obtain satisfaction or not of their demand from the proceeds in Court, they can have no legal authority to force the mate to an accounting with them in respect to those moneys, and that he would have a lien on them for the satisfaction of his wages as master.

Nor can the Court order an application of that money towards the satisfaction of the wages decreed him as mate, and accordingly he must take his compensation out of the moneys in Court to the amount settled by the report, and it must be left to an amicable adjustment, or to an action, bringing the proper parties before the Court, to secure the libellants, Hill and Owen, the benefit of that fund belonging to them.

The motion to confirm the report will, therefore, be granted. The deduction of \$62 75, asked for, is denied, but without costs on that motion.

THE SLOOP MARTHA ANNE.

This court has jurisdiction on the instance side over maritime torts committed within the ebb and flow of tide.

Long Island Sound is not only, in common law acceptation, an arm of the sea ; it is a strait and parcel of the high seas ; it is not within the territorial limits of any particular State.

The inhabitants of Oyster Bay township have the exclusive right to the oyster fishing within that bay. And the town has authority to enact and enforce by-laws in support and protection of that right.

But process issued by a justice of the peace, under the authority of those laws, cannot be executed on the Sound.

The seizure and detention of the libellant's vessel, for the purpose of executing such process on board her, was a maritime trespass and tort.

An action *in rem* against the vessel attached, and *in personam* against the respondent, her master, will lie in this court for the tort.

The libellant is entitled to recover damages in this action, in satisfaction of the injury he has sustained.

But those damages should be mitigated, upon the consideration that the respondent was acting under the command of officers of the law, and without intention to do the libellant any wrong.

BETTS, J.—The pleadings and proofs in this cause are exceedingly diffuse and contradictory. The case to be gathered from them is, substantially, this. On the 2d of June, 1843, a number of fishing craft, of which the sloop Bahama, owned by the libellant, was one, went into Oyster Bay, on Long Island Sound, anchored in tide waters, and engaged in dragging and raking oysters, and taking them on board. None of the vessels or persons employed in them belonged to Oyster Bay. The libellant resided in Pelham, Westchester County, where the Bahama also belonged.

The township of Oyster Bay, by an ordinance or by law, authorized by the laws of the State of New-York, (1 R. S. 336,) prohibited any person who was not an

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inhabitant of the town, dragging or raking oysters within the bay, and subjected the person complained of and convicted of the offence, to a fine, &c.

Complaint was made by the supervisors of the town before a justice of the peace of the town, that the above mentioned vessels, including the Bahama, with their crews, had violated the law, and were then in the act of fishing oysters within the bay. Whereupon the justice issued a warrant to a constable of the town, commanding the arrest of the persons complained of.

About the same time, the said oyster craft all made sail, and left the bay, running out into the Sound.

The sloop Martha Anne was, at the time, in Oyster Bay, and was taken possession of by the constable, under the orders of the magistrate and supervisors of the town, to go in pursuit of the oyster craft, then under way. A posse of forty or more men were also summoned on board the sloop to aid the constable in making the arrest of the fishermen. Many of them took fire-arms on board, and the constable was accompanied in the expedition by the supervisor and justice of the peace, who issued the warrant of arrest, all of whom gave orders to the company on board the sloop to proceed and arrest the accused, and acted in directing and aiding the execution of the orders.

The sloop, thus prepared, sailed in pursuit of the oyster craft, and as she neared them, they were huddled together, some dozen in number. The men on them forbid the approach of the sloop; and by threatening to use various weapons, which were brandished and presented, including axes and fire-arms, endeavored to keep her and her company off. The sloop was,

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however, navigated so as to be brought up against and made fast to the Bahama, when twenty or more men from her, several of them with fire-arms, sprang on board and arrested all the persons found there, who were brought back in the Martha Anne to Oyster Bay. The respondent was master of the Martha Anne, and under the orders of the civil officers before mentioned, aided in navigating her out, and in towing back the Bahama to Oyster Bay harbor.

It was proved that she was brought back to save her, there being no one on board to take charge of her after her master and crew were arrested. The Bahama was anchored and left by those who brought her back in that harbor, but her master was held in arrest under the warrant, and was taken before a justice of the peace, who condemned him to pay a fine for the offence charged against him. No one interposed to prevent the libellant resuming possession and free use of the sloop subsequently, but he allowed her to remain unreclaimed and falling to decay at her anchorage.

The respondent and claimant except to the jurisdiction of this court in the case, because the subject matter is within the cognizance of the local courts, and the remedy of the libellant, if any he has, lies at law, and not in Admiralty.

This objection would be unavailing in the English Admiralty, provided the *locus in quo*, where the transaction took place, was upon the high seas. (3 *Black.* 106; 2 *Brown Civ. and Ad.* 107, 201.) So under our federal system, District Courts proceeding as Courts of Admiralty and maritime jurisdiction, have cognizance on the instance side, of maritime trespasses and torts, both *in rem* and *in personam*. (*The Almeida*, 10 *Wheat.*

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473; *Dean v. Angus*, *Bee's R.* 369; *L'Invincible*, 1 *Wheat.* 238; *The Candaleiro*, *Bee's R.* 60.)

The subject matter, then, indisputably appertains to the jurisdiction of this Court, provided the place in which the wrongful acts were done was so also.

In this respect, our national judiciary has a wider Admiralty and maritime authority than is exercised by English Courts of Admiralty. It extends over all navigable waters where the tide ebbs and flows, and is not, as is urged with great learning and force of reasoning, restricted by the condition that the waters be out of the territorial limits of the States. (*De Lovio v. Boit*, 2 *Gall.* 4, 398, and notes; *Hale v. Washington Ins. Co.* 2 *Story R.* 176.)

But in this case the proof is clear that the libellant's vessel was come upon by the respondent and the Martha Anne, near the centre of Long Island Sound. The Sound is an arm of the sea, within the common law acceptance of the term, being navigable tide-water, (*Hargrave's Law Tracts*, ch. 5; *Carter v. Merit*, 4 *Burr's R.* 2,162; *Hooker v. Cummings*, 20 *Johns. R.* 98,) and more specifically an arm of the sea than mere rivers, bays or inlets; because, in addition to its tide-water and navigable quality, it is without the territorial limits of any county. (1 *Kent*, 364, 367.)

It more properly is a strait, or inland sea, having communication with the ocean at each end, and lying between a long extent of land on two sides of it. (*Jacob. L. Dict. Straits.*) But what imparts an unquestionable maritime jurisdiction to the United States Courts over its waters, and renders it within our jurisprudence, *the high seas*, is, that it is not within the territory of any particular State of the Union.

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In my opinion, therefore, there is no solid ground of exception to the jurisdiction of the Court over the case presented by the libel. The libellant is entitled to satisfaction for the wrong he has sustained, out of the vessel which was the instrument by which it was inflicted, and against the master who was the agent causing it.

The great stress of the contestation in the cause between the parties has been upon the right of the inhabitants of Oyster Bay to the exclusive fishing of oysters in that bay, and the power of the corporation of the town to enact and enforce the ordinance or by-law in question.

I do not go into that subject. It has been largely discussed in the State Law Courts; and the statute law of the State, together with the decisions of those tribunals, undoubtedly settle that point conclusively, independent of the coincidence of decisions of the Federal Courts with the doctrines laid down by the State Courts. (6 *Cowen*, 376; *Ib.* 545, notes; 20 *Johns. R.* 90; *Wendell*, 237; 5 *Ib.* 423; 14 *Ib.* 43; 1 *R. S.* 336; *Baldwin C. R.* 70; 16 *Peters' R.* 367.)

The bearing upon that topic is unimportant to this case, because, conceding the exclusive title to the fishing in Oyster Bay is vested in the inhabitants of that town, and admitting the validity of the by-laws passed to support the title, and the regularity and conclusiveness of the proceedings before the magistrates to enforce those by-laws and arrest the parties accused on the occasion in question, yet no authority could be derived from those facts to seize or molest the libellant's vessel at the place where she was trespassed upon and arrested. That place was entirely out of the jurisdiction of the local magistrates. The law creating the County

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of Queens does not extend its boundaries into the Sound. (3 R. S. 2.) And, accordingly, there is no color of right shown in justification of the acts complained of, and the libellant is entitled to a decree against the respondent and the Martha Anne, for remuneration of loss thus sustained by him.

I do not think those damages should be of an aggravated or exemplary character against these parties. The respondent did not inflict the wrong wantonly. There is no evidence that he volunteered his sloop or himself personally in the enterprise. He acted under the direction of officers of the law, who could rightfully exact the assistance demanded within the territory of the County; and there was sufficient probable cause for him to submit himself and his vessel to their commands, to remove all presumption of a wilful purpose on his part to perpetrate a wrong and trespass on the property of the libellant. The testimony does not fix upon him any further participation in the tort than being present with his vessel. He is undoubtedly legally responsible to the libellant for the injury inflicted, but the case made out does not call for vindictive or extraordinary damages against him.

The Bahama was taken back to Oyster Bay by order of the public officers controlling the proceedings, and anchored there, within one hour after her arrest, and was there left in a safe position and one easy of access for the libellant; and it does not appear that he was in any way prevented resuming immediate possession of her.

This, in my judgment, is the reasonable bearing and result of the statements of the witnesses given on the hearing.

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I shall order that the libellant recover \$50 and his costs, to be taxed, and that he take a decree *in rem* against the vessel, and *in personam* against the respondent therefor.

W. J. Haskett, for libellant.

Emerson & Pritchard, for claimant.

WILLIAM PIEHL v. GEORGE BALCHEN

As averment in a libel by a seaman for wages, who has signed articles for a voyage from New-York to Pernambuco, thence to a port in Europe and back to the United States, is sufficiently supported, in case the master or owner does not produce the articles on trial, by proof that the agreement was, that the first terminus was some port in South America, not designated.

But an allegation that the voyage was continued from the port in Europe to the Cape de Verd Islands, to Rio Janeiro, to Monte Video and Buenos Ayres, does not render the after run of the vessel a part of the voyage agreed for in the articles; and unless assented to by the crew, will be a wrongful deviation, which discharges their obligation to the vessel.

A stipulation in writing for a series of voyages may be terminated or varied by mutual consent of the master and crew, and a new voyage be substituted by parol agreement.

But the desertion of the seamen during the second voyage cannot be made to enure to the master as a forfeiture of wages earned and due under the first one.

A receipt signed by a seaman at the end of an eight months' voyage, acknowledging the payment of \$9, in full of all demands against the ship, will not bar his suit for wages and short allowance, without proof of an adequate compensation actually paid him.

Quere. Whether proof of the handwriting of a subscribing witness to the said receipt, the witness being dead, is adequate evidence of its execution.

Compensation for short allowance is recovered as wages, and a general form of pleading is sufficient to admit evidence of the right, if not excepted to before trial.

Usually the sailor is required to prove no more than that a deficiency of provisions was served out, and the master can justify the short allowance only by proving the ship was furnished with a sufficient supply.

But if the seaman delays his action three or four years after the voyage is ended, the Court will require him to give, also, at least proof constituting a reasonable presumption that the vessel went to sea unprovided with a proper supply of provisions.

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If a seaman, sent on shore in the employment of the ship, neglects to return to his duty, the ship continuing at the port a sufficient time to give him opportunity to do so, the master in the mean time making inquiry for him, such voluntary absence will be a desertion and forfeit his wages.

THE libel in this case was filed for the recovery of wages, including compensation for short allowance of provisions and water. The libellant alleges that he shipped as an ordinary seaman, in New-York, on board the bark *Caroline*, of which the respondent was master, in the month of October, 1839, and signed articles for a voyage from New-York to Pernambuco, and thence to a port or ports in Europe and back to New-York, at the rate of ten dollars per month. He further alleges, that he performed the voyage to Pernambuco, and from thence to Hamburgh, between which two places he was put on short allowance of bread, water and salted provisions for forty-eight days, caused by the master's having sold the ship's provisions at Pernambuco. That the vessel then proceeded from Hamburgh to the Cape de Verd Islands, from thence with a cargo to Rio Janeiro, which was delivered there; thence with another cargo to Monte Video, which was there delivered; thence to Buenos Ayres with a cargo, which was delivered at the latter place. That he was sent ashore several miles from the ship by the master in a small boat, and was, by the violence of the seas, thrown out of it, and greatly injured, by being washed upon the rocks, and, as he imputes, was intentionally abandoned there by the master, where he was impressed into the naval service of the country; and he further alleges in detail, great bodily sufferings and detentions, which prevented his return to New-York until the 25th of July last.

The respondents say, in their answer, that "it is

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true," as is alleged in the libel, "that in the month of October, 1839, the barque, then in the port of New-York, and bound on a voyage thence to Pernambuco, and thence to one or more ports in *Brazils*, thence to Europe, Havana or the United States," shipped the libellant to serve as an ordinary seaman, for said voyage, at the rate of seven dollars per month wages, and admits that the voyage stated in the libel was performed by the libellant. But the answer denies all the allegations of short allowance, cruel treatment, &c., and alleges, in defence of the demand of wages by libellant, that he deserted from the vessel at Buenos Ayres, and thereby forfeited all wages earned previous to such desertion and after the vessel left Hamburg; and that for the wages earned before the arrival at Hamburg, he had paid him in full, for which he produced a receipt, dated at Hamburg, June 29, 1840, for nine dollars, in full of all demands against the ship, and proved the handwriting of the subscribing witness to the receipt, who is now dead.

Upon these issues the parties went to trial, September Term, 1843, and on the 5th of October the Court rendered a decision in favor of the libellant for wages, at the rate of \$10 per month to the termination of the voyage at Hamburg, and at the rate of \$7 per month for the voyage from Hamburg to Buenos Ayres, up to the time the libellant left the vessel at that port, and denied any compensation for short allowance.

The parties moved for a rehearing of the cause. The motion was granted, and the cause was again argued in February Term, 1844.

E. C. Benedict, for the libellant.

N. D. Ellingwood, for respondent.

BERRA, J.—The libellant in this cause seeks to recover a balance due him for wages, and compensation by way of wages, for short allowance of provisions and water on the voyage. The shipping articles were not produced on the trial. Gelston, the shipping-broker, testified, that he shipped the libellant in October, 1839, on a voyage, at ten dollars per month, to go to South America, thence to Europe, and back to the United States, and for a time not exceeding two years.

The agreement is not proved by the libellant as he alleges it, nor is it distinctly admitted by the answer; and the voyage actually performed was one variant from that described in the libel or answer, or by the broker who made the shipping contract with the libellant. But the voyage run comports sufficiently with the agreement proved to support the libellant's case, up to the arrival of the vessel at Hamburgh.

After that, a new line of adventure was entered upon by the vessel, the libellant insisting on the trial that he continued on board under the terms of his first engagement; and the respondent, in his answer, did not allege there had been any change of voyage or agreement. It merely avers that the libellant was paid off in full discharge of his wages at Hamburgh. The answer also admits that the libellant continued to serve on board the vessel subsequently until her arrival at Buenos Ayres, and charges that the libellant deserted the vessel at Buenos Ayres, and thereby forfeited all claim to wages.

The libellant does not, in his libel, assert any change of voyage or departure from his original shipping con-

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tract, at Hamburgh, nor does the answer set up a new engagement at Hamburgh, or abandonment of the old one there. The pleadings, if severally held to, would limit the controversy to the first voyage, which terminated at Hamburgh; there are no averments in the pleadings bringing the after voyage under these terms. But the proof is clear on both sides, that the libellant, after having left the bark at Hamburgh, reshipped at that port, and continued to serve on board to the arrival of the vessel at Buenos Ayres. Indeed, the main points to which the evidence and arguments in the cause were directed, relate to transactions at Buenos Ayres. There is no written evidence of the terms of the latter engagement, nor is there oral proof, direct or satisfactory, to that point; all that is alleged by the respondent to have been earned by the libellant relates to the amount of wages.

The respondent, upon this state of the pleadings, cannot avail himself of the fact, if sufficiently established by the proofs, that the libellant deserted the vessel at Hamburgh, and thus lost his claim to antecedent wages; nor can the libellant justify a subsequent desertion from the vessel at Buenos Ayres, upon the ground that she had deviated from the voyage for which he shipped at New-York. Because, it is manifest that if there had been cause of complaint on both sides that the shipping contract was violated, the objections were adjusted or waived, on the termination of the voyage at Hamburgh, where a new contract and voyage were entered into by the parties.

The points of contestation upon the issues, made by the pleadings, in relation to the first voyage, are the rate of wages to be paid, whether the libellant was put

on short allowance on the voyage, and whether he abandoned the vessel at that port, and his claims were wholly paid and settled at Hamburg; and in respect to his farther continuance on the ship, whether he was to receive the same wages as under his first engagement, and whether he deserted the vessel at Buenos Ayres, and thereby forfeited all wages then unpaid him. The respondent does not produce the shipping articles, but insists that the libellant shipped at seven dollars per month wages.

The proof is quite satisfactory that the agreed rate of wages at New-York was ten dollars per month, and that it was so expressed in the shipping articles.

The respondent gave in evidence a receipt signed by the libellant, at Hamburg, June 29, 1840, for nine dollars, in full, of his demand against the vessel. There is no proof of any payment made the libellant for the eight months he had then served on board, except his advance of \$12. Even at the rate of \$7 per month, the libellant had then earned fifty-six dollars, and no Court would allow a bald receipt given by a sailor, for nine dollars, to extinguish a clear debt of \$64, without proof of some further satisfaction, amounting to a real compensation to the seaman. (2 *Mason*, 561; 2 *Sumner*, 11; *Ware*, 11.)

In cases where parties act upon equality of intelligence, and no foundation for suspicion of fraud or imposition is laid by proof, a receipt is no more than *prima facie* evidence of payment, and may be explained, contradicted or varied by parol proof; and in the case of seamen dealing with a master upon the consideration of a small advance of ready money, for the discharge of their wages, the Courts will exact

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satisfactory proof that they have been justly compensated. It would be a glaring impropriety to allow this naked receipt to conclude the seaman, and bar his action, when the respondent only claims to have settled with him on the basis of paying at the rate of seven dollars per month, whilst the testimony is incontestable that the agreement was to pay him \$10. There was, accordingly, earned at the time that receipt was obtained, \$3 per month, for the period of service, above the sums claimed by the respondent, to have been credited and paid to the libellant. I do not advert to the questionable adequacy of the proof of the receipt to render it a reliable voucher against a claim of wages, only the handwriting of the subscribing witness being proved; because, in my opinion, the respondent is bound to give other evidence of actual payment or satisfaction of the debt, and cannot extinguish or bar the demand by proving the signature of the seaman to a paper acknowledging payment. The order entered on the first hearing in respect to wages only, is therefore affirmed.

But on a more critical consideration of the testimony and the answer of the respondent, I am inclined to think the former order rejecting the claim for short allowance ought to be modified. The technical objection that the libel did not sufficiently specify his claim for short allowance, had its weight in that decision; yet perhaps in the exceeding looseness and inapplicability of the pleadings on both sides, (for neither libel or answer make any issue upon the facts of the second or continued voyage,) the Court ought not to turn the cause back to procure from the parties a more apt and complete frame of pleadings. This objection

was made on the final argument, and was not brought forward to shut out the testimony to that point. So in respect to all the transactions on the voyage from Hamburg to Buenos Ayres, each party went into full proofs, notwithstanding there were no averments in the libel or answer to which the evidence was applicable. There is the more justification in letting evidence to this claim to compensation, because of short allowance, come in under a very general form of pleading, because a recompense for short allowance is given a seaman in the way of increased wages; (*Act July 20, 1790*;) and particularly in this instance the Court would be disinclined to favor severe strictness of practice, since an entire forfeiture of wages is made a substantive part of the defence. One of the witnesses testifies that the crew were on exceedingly short allowance for forty or fifty days, and the witness called by the respondent admits the allowance was very scanty for a considerable period between Pernambuco and Hamburg.

No evidence is given of the quantity of provisions supplied the vessel for the voyage. This proof should be furnished by the ship, when the fact that the crew were put on short allowance is proved. But as the demand in this instance is a stale one, I think it was no more than reasonable that the libellant was required to give evidence importing that the ship was insufficiently provisioned. This was done, and then clearly the burden of proof is upon the ship to show by clear evidence that she had placed on board all the provisions required by law. This justification has not been made by the respondents, and I shall accordingly allow forty days extra wages to the libellant therefor, at the rate of ten dollars per month, being thirteen dollars and thirty-three cents.

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The remaining and most litigated point between the parties relates to the alleged desertion of the libellant at Buenos Ayres. It was decided, upon the first hearing of the case, that the absence of the libellant from the ship at Buenos Ayres did not amount to a desertion which forfeited the wages due to him, particularly so if the defence of desertion was placed by the respondent on the contract of the libellant in the shipping articles, because the voyage to Buenos Ayres was palpably not embraced in that contract, but was a deviation from it, and the libellant was not bound by the articles to perform it. The defence, accordingly, was to be governed by the character of the agreement made by the libellant at Hamburgh. That was a parol engagement on a different consideration, and for a voyage not contemplated in the original articles.

After so long a period, it is difficult to find clear evidence of the circumstances connected with the transactions of that voyage, and the absence of the libellant from the ship; and I was disposed to regard his leaving the vessel the result of timidity and dread of the dangers of returning to her in a small boat in the night time, and not a wilful desertion, and to hold the blame of his continued absence to be mutual between him and the master. But upon further reflection, I am convinced that view was incorrect, upon the facts and circumstances of the case, and that even if his leaving the boat for that night might be attributable to alarm at the perils of rowing her out to the vessel, still there is nothing to excuse the libellant in concealing himself on shore, and continuing his absence from the vessel until her departure from Buenos Ayres. The vessel remained seven or eight days longer at that port; and it

is proved that the master inquired where the libellant could be found. This was all that should be required of him in discharge of his duty; and there was ample time for the libellant to have returned to his service on board, had he desired to do so. The lodgings of the master on shore were well known to him, where he could have reported himself at once.

It must be presumed he avoided doing either, because he intended to abandon the vessel. It appears, from the testimony, that he had previously contemplated leaving her at Buenos Ayres, and endeavored to persuade some of his shipmates to join him, assuring them that they could obtain very high wages at that port; and whether the expectation of such increased remuneration induced him to disregard his wages in arrear, or whether motives of resentment, pique or personal fear actuated him, I feel bound to hold that he voluntarily left the vessel at Buenos Ayres without leave, and without intending to return to her. Such abandonment of the ship is a desertion which works a forfeiture of the wages then due him on that voyage, (3 *Kent's Comm.* 198,) whether his agreement was by regular shipping articles or verbal.

Desertion incurs a forfeiture of wages, without the aid of stipulations in shipping articles; and the argument that the engagements in those articles do not embrace this voyage, is of no avail against this defence. It is valid and efficient, whether the shipping contract is verbal or written. It, therefore, matters not on this evidence whether the libellant was sailing under his shipping articles or a new and verbal contract. Had the libellant refused to proceed on this voyage, because it was one not designated by the articles, he could

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not be charged with desertion ; (*The Eliza*, 1 *Hagg.* 182, 248 ; *The Minerva*, *Ib.* 347 ;) but the new contract was obligatory upon him, and he is responsible for its violation. Having broken it by wilful abandonment of the vessel, without intending to return to her, he forfeits all wages earned during its continuance. This forfeiture does not retro-act and include the wages earned on the outward voyage to Hamburgh. That voyage terminated there by the new arrangement between the master and libellant for the present one.

I accordingly decree that the libellant receive for eight months' service on board the vessel, up to the close of the voyage at Hamburgh, eighty dollars, and for short allowance during that period, thirteen $\frac{33}{100}$ dollars, being, in the whole, ninety-three dollars thirty-three cents, deducting therefrom the advance of twelve dollars, and nine dollars paid at that port, and his costs to be taxed ; and that the libellant's wages, earned on the subsequent voyage from Hamburgh to Buenos Ayres, be deemed forfeited for desertion at the latter port.

THE BRIG BRIDGEWATER.

In an action upon a bottomry bond, the production and proof of the execution of the bond will not entitle the libellant to a decree in his favor. He must prove, to the satisfaction of the Court, a necessity for the expenditures for which the money was advanced.

The libellants should exhibit an account of the items of expenses for repairs, supplies, &c., that the Court may judge whether they were necessary for effectuating the objects of the voyage.

A bond may be good in part and bad in part, and the Court will, upon the evidence in the cause, give judgment for the whole or part of such bond, as the proofs may show to be equitable and right.

Benedict, for libellant.

Wilson, for claimant, cited 1 *Wheat.* 96; 8 *Peters*, 538; 2 *Peters*, 290; *Bell*, 120; 1 *Wash.* 49.

BERRS, J.—The libel in this case was articulated upon an instrument in writing, purporting to be a bottomry bond, dated September 17, 1843, executed by the master, at Pensacola, for \$2,179 18. He drew, also, a bill of exchange the same day for the same amount, upon the owner at Philadelphia. The claim is resisted, on the ground that the money was not obtained for the necessities of the ship and voyage. The claimant intervenes, as prior mortgagee, for \$4,632 50. The brig was owned in Philadelphia.

No evidence was produced on the part of the libellant at the hearing in support of consideration of the bottomry, and it being considered by the Court that it is incumbent on the libellant to prove an apparent necessity for the expenditures and advances covered by the bond, further time was allowed on his

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motion to "present proofs to establish its validity." On the subsequent hearing, the libellant offered evidence conducing to show that the brig arrived at the port of Pensacola needing repairs, and that the libellant advanced moneys to the master for that purpose, and for her necessary supplies. It was further shown, that the brig was hypothecated by the master to secure the bill of exchange above mentioned, drawn for \$2,179 18.

The master of a vessel, as agent of the owner, has the right to contract for repairs and supplies necessary for her abroad, and he may hypothecate her, as well as the freight, for the security of the credit, with maritime interest thereon. But the bond is not of itself adequate proof of the necessity for such hypothecation; that must be shown *aliunde*. In suits on bottomry bonds, the libellant must prove by evidence, other than the bond itself, that the money was lent, or the repairs made, and materials furnished to the amount claimed, and that they were necessary to enable the vessel to perform the voyage, or for her safety, and could not be obtained otherwise upon the credit or with the means of the owner. He must also exhibit an account of the items advanced, with sufficient proof to support them, to enable the Court to judge of their necessity. (*Crawford v. The William Penn*, 3 Wash. C. C. R. 404; *Hurry v. The John and Alice*, 1 Wash. C. C. R. 293; *Boreas v. The Golden Rose*, Bee, 131; *The Aurora*, 1 Wheat. 96.)

In *Clark v. Laidlaw et al.*, the Court say, the interest of ship owners would be put in great jeopardy if they were bound to pay any bill drawn upon them, or a bottomry bond given by the master, without requiring proof of the circumstances which authorized the master to

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obtain money in a foreign port on the credit of his owners. (4 *Rob. R. (Lou.)* 345.)

No adequate proof has been offered on the part of the libellant of the amount actually advanced by him, nor has he produced to the Court, as he ought to have done, an account of the items of the loan. The evidence may fairly be deemed to prove that \$350, obtained from the libellant, was used by the master in Pensacola for the necessities of the brig and her voyage. The application of the residue of the loan is unaccounted for.

The master was owner of one-eighth of the vessel, and if he might hypothecate her to the amount of his interest, irrespective of her necessities, it is not proved that his interest would be of any value after satisfaction of the amount covered by the bottomry debt. The present decision will, therefore, regard nothing more than the actual bottomry debt. A bottomry bond may be good in part and bad in part, and will be sustained by the Court, so far as it rests on a fair bottomry loan. (*The Rachel*, 3 *Mason*, 255.) Upon the proofs before me, I am satisfied that no more than the sum of \$350 was expended upon the brig, or was required to supply her actual necessities at the time of the hypothecation. To that extent the vessel is chargeable to the libellant on the bottomry security. He is accordingly entitled to a decree for the sum of \$350, with maritime interest thereon from the date of the bond. That sum not having been tendered him, he is also entitled to recover full costs, to be taxed. A decree in his favor for such amount will accordingly be entered.

Steam Tug William Young.

THE STEAM TUG WILLIAM YOUNG.

In an action for damages to a sailing vessel by collision with a steamer, the burden of proof lies in the first instance on the libellant.

If the collision is occasioned by an alteration of the course of the sailing vessel, it devolves upon her to prove the propriety or necessity of such movement.

Each vessel is bound to observe the rules of navigation applicable to their respective positions.

The steamer is culpable in crowding upon the sailing vessel so as to render a danger probable in her situation, but is not required to protect her against the consequences of her own mistakes or negligence.

In this case, the two vessels being navigated in opposite directions, and approaching each other on lines nearly parallel, and spread wide enough apart to leave a passage safe to each from the other, and the sailing vessel changing her course, without necessity, to cross the bows of the steamer, so near to the latter that stopping and backing the engine did not avoid a collision, she cannot support an action for the damages thereby incurred.

G. A. Bucknell, for libellant.

H. B. Scoles, for claimant.

BETTS, J.—This was a case of collision, by occasion of which the sloop Charlotte was lost. The following facts are made to appear upon the pleadings and proofs. The sloop Charlotte was well equipped, and of sufficient strength for the safe navigation of the North River; was on a trip down the North River, a short distance below West Point; came in collision with steamboat William Young, going up the river, with a tow attached to her, when opposite Buttermilk Falls. When the two vessels neared each other, the steamboat was standing in close to the east shore, and running up along it, and the sloop was holding a straight course down near the middle of the river, with the wind N. W. and tide ebb,

the breeze being free and sufficient for steering, so that she was enabled to hold that course, or to have placed herself further west, with facility and safety. The channel of the river was half a mile wide at that place. Supposing the steamboat to be varying her direction more westward, the pilot of the sloop changed her course, heading off towards the east shore, beyond and inside of the steamboat. The steamboat had, at the time, the barge Union in tow on her larboard side; she was in the usual channel and route of steamboats ascending the river, and was passing through the water at about five miles an hour.

The sloop was running at about the same rate. The steamboat had met other vessels in the vicinity, all of which passed her to the west in safety. The position and course of the steamboat would have carried her one hundred yards east of the sloop, if the latter had not changed her direction and veered eastward. On observing that movement, the pilot of the steamer rang the bell to slow her speed, and hailed the sloop in a loud call to luff, stopping the engines and ringing, also, to back her: and whilst the engines were working backwards, the sloop, heading directly east, crossed athwart her bows, and the collision occurred. There was not room between the steamboat and the east shore for the sloop to have passed safely in that track, if she could have got around the bows of the steamer. Every practicable effort was made on board the steamer by the pilot and men to avoid the collision, after they discovered the purpose of the sloop. The collision was by a slanting or glancing blow, the starboard side of the sloop, forward of the main chains, came in contact with the larboard bow of the barge, which was in tow by the

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steamboat on her larboard side. The position and course of the two vessels in relation to each other on their near approach, and before any movement was made on either side in apprehension of a collision, afford a strong presumption against the allegations of the libellant and in support of the defence.

The master of the Convoy, another sloop in the wake of the Charlotte, proves that the latter was a safe distance to the westward of the steamer, running down the river on a N. W. wind, on a line parallel with that pursued by the steamer. It is palpable that her starboard side could not, in that mode of their approach, have been reached by the larboard side of the steamer, had the latter, as is charged, suddenly altered her course and bore off to the west.

The sloop, after the blow, passed directly ahead of the steamboat, and struck her bowsprit on the shore, and receding back from the shock, sunk two or three hundred feet from the place of collision.

None of the witnesses impute any blame to the movement of the steamboat. Some called by the libellant, who alleged the steamer was bearing more westward, admit that if she had kept her way after the sloop changed her course, the collision might not have occurred. The weight of evidence supports the testimony of the pilot of the steamboat, who testifies that he did not change his course, which was to keep close along the range of the east shore. He was steering for North Point off West Point, in order to keep that position for the steamer. Several witnesses state that he was a skilful and careful pilot—that he was on the proper course, and it was easily within the power and the clear duty of the sloop to have luffed; and had that been

done, all danger and difficulty in the navigation of the two vessels would have been avoided. The counsel for the libellant, upon this state of facts, insists that the case of *Hawkins v. The Duchess and Orange Steamboat Co.* (2 *Wend.* 452,) is in point, and conclusive against the defence of the claimant. But it is to be observed that the evidence in that case established a want of reasonable precaution, and indeed showed positive, if not gross negligence on the part of the steamer, in holding her own headway, and compelling the sailing vessel to depart from her proper course, or abide the risk of a collision, when she might have prevented it by stopping and backing—the steamer, in that case, being held culpable for omitting to do what was promptly done by the steamer in this.

It is not to be assumed without evidence, even between a steamer and a sailing vessel, that in case of a collision the fault is necessarily with the steamer. Each vessel is bound to observe the established and notorious rules of navigation applicable to their respective positions. In a cause of damage, the party seeking compensation must sustain the burden of proving the vessel proceeded against was blameable and in fault. That alone founds a complaint for compensation. (2 *Dods.* 85; 8 *Law Reporter*, 295.) Although a higher degree of responsibility is cast upon steamers, and they are bound, as a general rule, to keep out of the way of sailing vessels, yet the latter cannot justify a departing from their course on a probability of encountering an approaching steamer, unless she is crowding so much upon the track as to create an imminent danger of collision. The law requires that there should be preponderating evidence to fix the loss on the party charged.

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(*The Lige*, 2 *Hagg*, 356.) In suits for collisions occasioned by a mischance imputable chiefly to the want of proper care and precaution on the part of the vessel damaged, the action will be generally dismissed with costs. (*The Catharine of Dover*, 2 *Hagg*, 154; *Bayly*, *Baron*, 2 *Crompton and Neeson*, 22; 11 *East*, 60; 3 *Car. and Payne*, 528.) I am of opinion the libellant has failed to establish the facts requisite to a judgment in his favor. He does not prove that the collision happened by means of any fault or negligence on the part of the steamboat. It was brought about by an attempt of the sloop unnecessarily to run across the bows of the steamer, and get between her and the shore, where there was not in fact room for her, and where, under the circumstances, she could not rightfully go. The libel must be dismissed, with costs.

THE SHIP GRAFTON.

By the established course and custom of the coasting trade in New-York, goods on freight may be delivered at the wharf, and need not be tendered personally to consignees. The ship cannot abandon goods on the wharf, because of the inability or refusal of the consignee to receive them.

A delivery of a cargo on the wharf, in New-York, with notice to the owners of the time and place of unloading, places the goods at their risk, and discharges the ship from liability.

The master's responsibility in delivering cargo is measured by the practice and usage of the place. A ship cannot be compelled to lay idle, because some consignees apprehend bad weather, and decline to receive their cargo, if the time be reasonably favorable for unloading. All the shippers of cargo have a right to require despatch in the unlivery of the cargo, that their goods need not be detained.

Although the consignees give notice to the ship that they will not receive the cargo because of the unfavorable state of the weather, or other reason, but do accept and remove it in part as delivered from the ship, they cannot claim indemnity from the ship for injury to the cargo by a storm to which it was exposed whilst on conveyance to its place of storage.

L. R. Marsh, for the libellants.

F. B. Cutting, for the claimant.

THE following summary of facts and testimony, connected with the comments thereon in the opinion of the Court, present the main points bearing upon the question in dispute in this cause.

The ship Grafton, a general vessel, took a freight at New-Orleans, 267 bales of American hemp, consigned to the libellants at New-York. The vessel was moored at Pike-street dock on the afternoon of the 6th day of June last, (1844,) and notice was given by her agents, in the public papers of the next and following days, that she would begin unloading her cargo on the 7th June. The libellants' place of business is in Broad-street, and

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they had engaged storage for the hemp at No. 14 Water-street, a distance of one and a half to one and three fourths of a mile from the ship. It rained on the morning of June 7th. but the rain ceased by or before 9 A. M. The ship began discharging cargo between 9 and 10 A. M., and the hemp, lying uppermost, was first discharged. The libellants' cartmen, (under previous general directions to attend to this ship and another,) at 10 A. M. sent up a cart to the ship to ascertain if she was discharging cargo. The cartman returned with a load, and reported there was enough unloaded for three or four carts. Libellants sent notice to the agents of the vessel that they would not receive the hemp in that state of the weather, as it had the appearance of rain. This notice was given a quarter before 12. The day was sultry, and occasionally cloudy, with the appearance of rain. Other vessels at different wharves took in and discharged cargo during the day till after 3 P. M., when a violent gust of rain came on suddenly, by which the hemp landed on the pier was wet and greatly damaged. The usual notice was given the libellants at their counting-house, June 7, at 9 A. M., that the ship had commenced discharging the hemp; they at this time refused to receive a delivery on the wharf, because the weather was unfavorable. The witnesses of the libellants testify that notice was given to the agents of the ship, at a quarter before 12, that the hemp would not be received because of the bad weather, and that the agents agreed to stop unloading if the libellants would take away what was then discharged. The agents both deny that any such agreement was made, and that any notice was given them by the libellants that the hemp would not be accepted.

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The libellants' witnesses testify that not over 100 bales had been discharged at 12 o'clock, and that the vessel continued discharging till between three and four o'clock P. M., and just as it was beginning to rain.

The claimant's witnesses testify that only about 50 bales were discharged after four o'clock, and that these were unladen within an hour.

Other circumstances corroborate the charge of the libellants, that the unlading continued as late at least as three P. M. One of the cartmen swears that drops of rain began to fall as he was taking on his last load; another cartman testifies that the rain overtook him soon after leaving the ship; and all the witnesses agree in their testimony that it did not commence raining till after three o'clock. Another circumstance corroborating the assertion of the libellants is, that the stevedores and the mate, testifying for the claimant, state that only 50 bundles remained in the ship when the men knocked off for dinner, at noon, and that it took about an hour after dinner to discharge those 50 bundles. It can hardly be supposed, therefore, that the residue, 217 bales, had been discharged before 12 o'clock, at most three hours, and, according to some of the witnesses, two hours' work.

BERRS, J.—Upon a careful consideration of the very extended evidence and the circumstances of the case, I am satisfied that the unlading of the ship commenced between nine and ten A. M., and continued at a rate of discharge which would complete the delivery of the hemp on the wharf at about three P. M.

Notice was given at the ship about noon, by the cartman, that the agents of the ship had agreed with

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the libellants to stop unlading at that time, and that they would receive no more hemp than was then upon the wharf.

Two carts had been put to work by the libellants before noon, and another after one o'clock. The cartmen removed one hundred and sixty-three bales, one hundred and four of which were safely put under cover; the residue were injured by the rain after arriving at the warehouse, and before they were stored. The remaining part of the cargo was left on the wharf, where it was landed by the ship, and there received serious damage from the rain.

Nothing was done by the officers or agents of the ship to protect the hemp after it was unladen.

It is proved to be the established course and usage in the coasting trade at New-York, to deliver goods on freight upon the wharf, at the port of destination. Upon these facts, the question of law arises, whether the ship had fulfilled her contract of carriage by such delivery of this shipment to the consignees.

This point will be considered, upon the assumption that due notice was given the consignees by the ship of the time and place of unlading; for, without reasonable notice, it is clear the ship would not be discharged of her responsibility by placing the hemp on the wharf. (*Gilbert v. Culver*, 17 Wend. 305; *Magill v. Potter*, 2 Johns. R. 37; *Smith's Mercantile Law*, 361; 2 Kent Com. 604.)

A carrier by water cannot leave or abandon, in an unprotected state, goods under his charge, even though there be an inability or refusal of the consignee to receive them. (2 Kent Com. 605, 5th ed., and cases cited; *Ostrander v. Brown*, 15 J. R. 39; *Kohn et al. v. Bor-*

dier, 3 Lou. R. 224.) In a case of transportation of goods coastwise, when the master of the vessel had notice that the consignee was not the owner of them, the Supreme Court of this state decided that landing the cargo on a wharf at the port of destination was no delivery, nor would a tender of them to the consignee, without his acceptance, constitute a delivery—a delivery implying mutual and concurrent acts of the carrier and consignee, equivalent to tender and acceptance. (*Ostrander v. Brown*, 15 J. R. 39.) In Massachusetts a distinction is recognised between the obligation of a consignee and owner, ordering goods to a particular port, where he would be bound to make provision to receive them. In such case the rule is assumed to be, that the vessel is only under obligation to land the goods and give the owner notice of the time and place, to place them at his risk; but if addressed to a mere consignee, who refuses to receive them, the vessel is bound to see that the cargo is properly secured or taken care of. (*Chickering v. Fowler*, 4 Pick. 371.)

There is nothing in this case in conflict with the doctrine declared in *Ostrander v. Brown* above cited. The Supreme Court of Pennsylvania hold, that with respect to vessels in the foreign trade, a delivery of the cargo at the wharf, with notice to the consignee, acquits the vessel. No distinction is made between the rule governing foreign or coasting vessels, and it seems conceded that a well-established usage or custom of the trade or port may determine the law of the particular case.

Without any usage to control the rule, the decision plainly implies that the law in respect to coasting vessels would be the same. In England great weight is

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given to the custom of the place or trade on a question of due delivery. It is allowed to control the construction of the bill of lading. (*Per Tindal, Ch. J., in Gatliffe v. Bourne and others*, 4 Bing. N. C. 314.) The like doctrine is recognised in the Supreme Court of this state, on a review of the English decisions. A deposit of goods by a carrier, conformably to the well-known usage in his line of business, is held to be equivalent to a personal delivery, and that without any actual notice to the party. (*Gibson v. Culver & Brown*, 17 Wend. 305.) In the case of *Kohn & Bordier v. Packard*, (3 Lou. R. 224,) Judge Porter, with his usual clearness and ability, discusses the doctrine of a constructive notice. He adverts to the rule as laid down by Chancellor Kent, that there must be a delivery on the wharf to some person authorized to receive the goods, or some act which is equivalent to or a substitute for it. The essence of the contract of affreightment is an engagement to deliver the goods to the consignee. A constructive delivery cannot be set up as a substitution for an actual one, without proving a notice to the consignee, equivalent to direct information. If that is not furnished, the carrier cannot be regarded as having performed his contract. It is not necessary now to inquire how far usage and custom may give notice. The law exacts no more, than that notice be brought home to the party sought to be affected by it, and custom may be admitted as a guide to determine whether the acts done effect that end.

In the early and strongly contested case of *Hyde v. The Trent and Mersey Navigation Co.*, (5 T. R. 394,) upon a full consideration by the judges of the liability of common carriers, it was held, that by the general cus-

tom, their liability is at an end, when the goods are landed at the usual wharf.

I think that the result of the cases is, that in a well-settled course of trade, as it is in this port in relation to coasting vessels, a delivery of a cargo on the dock here, with notice to the owners of the time and place of unloading, places the goods at their risk, and discharges the ship from its liability as a common carrier; (2 *Kent Com. and Story on Bail. before cited*;) although, in a case of a naked consignment, the ship might be under the further obligation to secure the property after it was unladen, if no consignee appeared, or if he refused to accept the goods. (15 *Johns.* 39, and 4 *Pick.* 374.)

The unloading, in the present case, was made by the ship in the usual manner, with only one set of falls or tackle. The hemp was deposited by itself on the wharf alongside the ship, at her mooring, disconnected from other goods, and perfectly accessible to the consignees. The ship was compelled to seek her berth a distance of one and a half miles from the warehouse of the libellants, and of all these facts they had knowledge. Had she moored at a wharf directly in their vicinity, the hemp would in that way have been discharged no faster than it could have been removed or stored with ordinary diligence. The great distance at which the ship lay from the storehouse, rendered that despatch in receiving the cargo much more difficult, and probably impracticable in the use only of the drays or means of transportation ordinarily employed by merchants in removing a cargo. This, however, was in no way the fault of the ship. She would not be justified in precipitating a cargo ashore with extraordinary haste,

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by the application of unusual means, but she had a right, and it was her duty towards all her shippers, to employ all reasonable diligence in unlading, and when such a course is adopted, it belongs to the consignees to make provision for receiving and securing the cargo as it is discharged. There might be a good deal of inconvenience in so doing, in the present case, but it is clear, upon the proofs, that it was in no respect impossible for the libellants to have saved the hemp in the vicinity of the ship, or by the employment of additional drays, to have removed it to the libellants' warehouse as fast as it was discharged. It must be borne in mind, that the master's responsibility as to the mode of delivery is essentially measured by the practice of the place. He is acquitted by landing his cargo at a proper wharf. After that, the cargo is at the risk of the consignee.

Independent of any special arrangement or agreement with the libellants in respect to the landing of the hemp, I consider the law justified the method pursued by the ship; and the question is then to be considered, whether her condition was varied by act of the parties. I do not discuss the point debated at the hearing, as to the liability of the ship if she discharges perishable goods in hazardous or improper weather against the consent of the owners. The Court of Pennsylvania intimates that such a circumstance might take a case out of the ordinary rule, and fasten the loss on the vessel. (*Cope v. Cordova*, 1 *Rawle*, 203.)

The preponderance of evidence in this case shows that the day was one of good working weather after nine A. M.; that there were clear indications of rain

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about noon, and that the storm in the afternoon came on abruptly, with but a few minutes previous warning.

A ship cannot be compelled to lay idle when prepared to unload, because consignees apprehend there may be a storm in the course of the day. Sultry days in summer are liable to vary from extreme heat to showers within a period of a few hours. But a ship-master could not protect himself against shippers in retaining their goods and closing his hatches because some consignees, whose goods were first discharged, feared a change of weather, and were unwilling their's should be removed, or refused to receive them until every chance of storm should be dispelled.

It is enough if, in view of all the circumstances, reasonable discretion was exercised in unlading, and I cannot say, upon the proofs, that any thing short of that was manifested on this occasion.

Upon the allegation of an engagement by the agents of the ship not to unlade that day, the proof is, that they agreed before noon to stop discharging the hemp and to send notice to the ship so to do, provided the libellants would receive what had then been discharged; and it is proved that more was taken away by the libellants than had been discharged at 12 o'clock. But the testimony is not so certain to this point as to enable the Court to say that the libellants succeeded in securing in store as many bales as were on the dock at 12 o'clock.

The argument for the claimant is, that the agents had no authority to bind the ship by such an agreement, if proved to have been made by them.

The evidence does not disclose clearly what the exact character of the agency was. It appears, how-

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ever, that the agents represented themselves to be, and acted as the consignees of the ship; announced the time and place of her unloading; collected the freights, and assumed to direct in the delivery of the cargo.

The owner had it in his power to show the limitation, if any there was, to the authority of the consignees; and, in the absence of evidence qualifying their powers, it must be assumed they stood in place of the owner, and clothed with the direct and incidental authority of a ship's husband in respect to the delivery of the cargo and collection of freights. A ship's husband is ordinarily a part owner; (*Abbott*, 69;) but there is nothing in the character of his duties, or the rules of the maritime law, limiting the office to an owner.

Judge Story enumerates very fully the duties and authority ordinarily exercised by that species of agent. (*Story on Agency*, § 35; *Story on Partnership*, § 418, collects the American and foreign authorities bearing upon the subject. See *Notes to § 35.*)

Whatever may be the appropriate appellation of such agents, it is manifest, upon the authorities and the reason of the thing, that the party to whom a ship is consigned, for the purpose of her proper entry, unloading and the collection of her freights, must have, as incident to the trust, the power of arranging with consignees of the cargo the time, place and manner of its delivery, and that accordingly his engagement to that end must be equally obligatory as if made by the owner himself.

The law only assumes to regulate the mode of delivery when it is not stipulated in the contract. (*Abbott on Shipping*, 248; *Syeds v. Hay*, 4 D.

and *E.* 260.) It construes bills of lading, which engage a direct and personal delivery of goods, to mean, that the delivery shall be according to the customs and usages of the trade or place. (*Jacobsen's Sea Laws*, 17; *Holt on Shipping*, 359; 1 *Rawle*, 203; 2 *Kent Com.* 605; 3 *Louisiana R.* 224.) But it does not prevent the parties putting a different interpretation upon the obligation of affreightment by their own acts or engagements.

If, then, it was the right of the owner in this case to discharge the hemp at the ship's berth immediately on giving notice to the consignees of the time and place of unlivery, yet it was equally competent for him to engage not to unlade before a particular day, or not faster than it was convenient for the consignees to receive it, or to stop the discharge at any period of the day; and a delivery in contravention of such undertaking would leave the ship still liable on the original shipment; and the agreement of his agents is of the same efficacy as if made by the owner himself.

It was the right, then, of the libellants, under the arrangement entered into with the agents of the ship, to refuse receiving more hemp than had been unladen at twelve o'clock; and if they seek to enforce the agreement, it belongs to them to establish, by proof, what that quantity was. The bales were not counted, and, to determine the amount discharged on the dock, they rely upon the judgment and estimates of cartmen, who merely looked at the pile. The opinions are in contradiction with those of the mate and stevedores employed in discharging the ship. The former class of witnesses rate the quantity at not exceeding a hundred bales, whilst the latter assert that all the hemp,

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except about fifty bales, was taken out of the ship and on the wharf. The collateral facts before adverted to in my judgment show that both estimates are wrong, and that there were probably a hundred and twenty-five or a hundred and fifty bales discharged at noon; and this is so near to the quantity actually removed, that the Court would not, in the absence of evidence, which the libellants ought to have supplied, assume that any more had been discharged than was taken away.

But if only a hundred bales were unladen at the time, the libellants could waive the stipulation releasing them from receiving more than that quantity, and in judgment of law they are to be regarded as accepting, as properly delivered, all they took from the wharf.

They are not entitled to charge to the ship the surplus over the agreed quantity as received for her benefit. No such understanding existed between the parties; and I shall accordingly decide, that the libellants have received, as duly delivered, all the hemp removed from the dock by their carts.

I further decide that the hemp damaged on the wharf was not delivered to the libellants so as to exonerate the ship, and that they are entitled to recover, in this action, its value.

Testimony as to value was reserved at the hearing until the principles involved in the controversy should be settled.

An order of reference to the clerk will be entered, when evidence can be adduced on both sides, on the questions of quantity and value of the hemp left on the wharf by the side of the ship.

WILLIAM R. FURNISS & CO. *vs.* THE BRIG MAGOUN.
DANIEL BUJAC *vs.* THE SAME.

Objections to an action merely formal in their character, cannot be taken on final hearing.

Exceptions, dilatory or declinatory, should be interposed on the return day of process, or at the day appointed for answering the libel.

If the objection intended to be made be, that the suit was commenced before the cause of action was matured, but it had become so before the hearing, the objection will be considered waived, particularly after an answer or claim is filed.

There would be still less reason for allowing such objection after the vessel sued had been condemned and sold, in another action, and her proceeds placed in Court, subject to these actions and others in prosecution against her.

The master of a vessel who hypothecated her on bottomry, is a competent witness in favor of the holder of the bottomry—particularly if released by him. A mortgagee of a vessel can intervene in a suit by a bottomry holder against the vessel, and contest the validity of the bottomry or its priority of lien, as against his mortgage.

Conditions preceding the authority of a master to hypothecate his vessel in a foreign port by bottomry.

A bottomry is not rendered invalid because it covers items of advance not entitled to a bottomry lien. It will be good for the sums which are clearly claimed as marine hypothecation, and will be reformed by the Court, rejecting the surplus in its final decree.

The Court will order a referee to ascertain and report the actual constituents of a bottomry lien, the validity of which is contested.

Seamen's wages, in this case, entitled to priority of payment out of the proceeds of the vessel, over the lien of libellants.

THESE two actions, brought to hearing together, are instituted on separate bottomry bonds given by Haven, acting as master of the brig Magoun, for advances made for repairing and fitting her for sea. The first one was given at Bordeaux, February 4th, 1843, for 4,000 francs, at a premium of 35 per cent., marine interest, payable three days after notice, at Philadelphia. The

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other to Furniss & Co., at St. Thomas, May 19, 1843, for \$1,272 68, payable at New-York on the arrival of the vessel, with 6 $\frac{1}{4}$ premium on this sum. The notice in the first case was given at Philadelphia May 10, 1843. The material facts are, that the brig was on a voyage from New-York to Trieste, Bordeaux, Angostura, St. Thomas, and back to this port. On the voyage from Angostura to St. Thomas, 19th May, 1843, while in charge of the pilot off Angostura, she was run on a bed of rocks in the river at Orinoco. On arrival at St. Thomas, a survey was held on the brig, and it appeared that the copper was much broken, and some of the planks were damaged, and the false keel greatly injured. The surveyors ordered the vessel thoroughly caulked, and the damaged places to be repaired. All the money for these repairs was taken up at St. Thomas; part of the amount obtained was expended in payment of stores, shipping a crew and other expenses, which had been incurred in the port of Orinoco. The vessel was consigned to J. L. Furniss & Co., in St. Thomas.

The money raised there was in part necessary for the immediate uses of the vessel, and it was in proof that she could not sail from St. Thomas without it. The master had no means of raising money, except by bottomry. After the vessel was repaired, she sailed for Mayaguez, (Porto Rico,) and thence to New-York, where she arrived on the 19th of June, 1843. It also appeared that a portion of the money raised at Bordeaux, on the first bottomry, was not for the necessities of the vessel then existing, but in anticipation of liabilities or necessities she might be subjected to if she prosecuted a voyage then projected.

J. W. Claghorn, a mortgagee of the vessel prior to either bottomry, appeared in both cases, and contested the validity of the hypothecations.

R. J. Dillon, for libellants, Furniss & Co.

F. R. Tillou and *F. B. Cutting*, for claimant and owner.

Charles C. Anderson and *James A. Bayard*, for Bujac.

Mr. Dillon, for Furniss & Co., denied that the claim put the bottomry in issue. He insisted that the proofs showed a legal case for a bottomry hypothecation at St. Thomas, and that it took priority of payment on the one given at Bordeaux.

He cited 1 *Dods*. 451; 3 *Sumner*, 236; *Ib.* 242; *Emerigon*, 87, 89, *Index*, iv.; 1 *Wheat*. 96; 8 *Peters*, 538; 8 *Serg. and Rawle*, 98; 2 *Philips' Ins.* 78; 8 *Pick. R.* 14; 3 *Hagg.* 66.

Mr. Bayard, for Bujac, maintained the validity of his demand, and its priority to Furniss & Co.'s.

He cited 3 *Sumner*, 236; 2 *Caines*, 77; 7 *D. & E.* 481; 1 *Starkie's R.* 27; 1 *Dods*. 464; 1 *Wheat*. 96; 2 *Dods*. 146; *Bee's R.* 339; 2 *Pet. Ad. Decisions*, 307; 2 *Dods*. 143; *Abbott*, 125, note 1; 1 *Hagg.* 176; 1 *Dods*. 201; 2 *Hagg.* 377; *Ibid.* 374; 2 *Parke Ins.* 879; 3 *Hagg.* 66; 3 *Wash. C. R.* 495.

Mr. Cutting, for the claimant, insisted that neither hypothecation had priority over the mortgage lien; and for the owner, he contended both bottomry bonds were invalid in law. He cited *Abbott*, 125, note 1; 3 *Hagg.* 66; 2 *Parke Ins.* (ed. 1842,) 875 to 879; 3 *Sumner*, 257; 1 *Hagg.* 169; 1 *Dods.* 273-4-5; 2 *Campb.* 485-6.

Furniss v. Brig Magnum.

Barra, J.—The defence set up against the hypothecations in suit contests the validity of both bonds, upon the ground that the repairs and expenditures upon the vessel were unnecessary, and that the master had other resources sufficient for her actual wants, and had no authority to resort to a bottomry for other than necessary supplies or expenses connected with the voyage, and that he obtained the money for other objects and purposes. No misconduct or fraud is imputed to the master in the pleadings, and no proof has been adduced to show a misapplication of the funds raised, or that he had any freights which the brig had earned previous to her bottomry. The master had been in command of the brig for three or four years, and enjoyed the full confidence of her owners. Bujac also controverts the validity of the bottomry to Furniss & Co., and claims the priority of his hypothecation.

The cause has been argued with great ability and a thorough examination of the facts and authorities bearing upon the questions raised on the issues. Two preliminary objections have been interposed by the claimant and owner, either of which, if sustained, may bar the action in the case to which it applies. It was insisted, that at the time of filing the libel in Bujac's case, the bond had not become absolute and suable, the condition being, that the sum received should be paid at or before the expiration of ten days after the arrival of the vessel in New-York, whilst the action was commenced previous to that time. This objection, which is in the nature of a dilatory plea, should have been raised on the return day of the warrant of arrest by way of exception. It does not go to the merits of the action, but merely alleges the prematurity

of the suit, and amounts to no more than the dilatory or declinatory exception of the civil law. (*Browne's Civ. and Adm. Law*, 363; *Dunlap's Adm. Pr.* 192.) Moreover, when the claimant intervened and filed his claim, the bond had become absolute, and the vessel or her proceeds was then under actual arrest and in custody. She had been libelled and attached in this Court on a suit for seamen's wages for the same voyage, and had been condemned and sold in that action, and her proceeds paid into Court. These are adequate reasons for disregarding exceptions to the action of a merely formal nature, and first raised in the case on the hearing. The claimants may well be deemed to have acquiesced in the antecedent proceedings. (*The Neptune*, 3 *Hagg.* 132.)

An objection was also raised to the right of a mortgagee to intervene in an Admiralty case and contest the validity of these hypothecations. As this point was not suggested on the argument, and not put forth in the pleadings, it would not be now regarded by the Court, if it supplied sufficient cause for the exclusion of the claimant. But as a mere defect of pleading might be remedied by an amendment, it is proper to observe, that all holders of liens on a vessel or her proceeds, are competent parties to contest, in Admiralty, the titles or claims of other lien holders upon the fund or ship. (3 *Hagg.* 331.)

The second preliminary point is to the competency of the master to be a witness for the libellants, notwithstanding the release given by them on the hearing. His testimony is urged to be indispensable to the libellants, as without it they have failed in establishing the preliminary facts upon which their right to a decree is dependent. The pro-

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duction of the bottomry bond is not of itself sufficient proof of those facts as against the claimant and owner. It must be shown by extraneous evidence that the advances were made for repairs or supplies necessary for the instant use of the vessel, or effectuating the objects of the voyage, and that they could not have been raised otherwise than by resorting to a bottomry. (*The Aurora*, 1 *Wheaton*, 96.) It was insisted that the master had a direct interest in the suit, which was not removed by the release, as, if the libellants did not succeed, he would stand liable to them personally for the debt. And the case of the *Ship Fortitude* (3 *Sumner*, 228) was relied upon as sustaining the objection. This case is in conflict with *Evans v. William*, 7 *T. R.* 481, *note*; *Milward v. Hallett*, 2 *Caines' R.* 77; and *Rocher v. Busher*, 1 *Starkie's R.* 27. And the eminent judge speaks with great reserve in giving his decision in the cause. He remarks, "I am ready to confess that I am not confident that this opinion rests upon grounds so clear that it ought not to yield to a settled course of practice; and I greatly fear that there is no authority which directly sustains it." It seems to me that the opinion of Judge Thompson, in *Milward v. Hallett*, presents the true rule upon this point, upon reason and authority. The interest of the master is balanced. If the libellants could recover of him upon the bond, for advances necessary for the ship, he would have his action over against the owners for the moneys so employed. He was merely an agent acting within the line of his duty, and if made liable in the first instance on his contracts for the loans, he would be entitled to indemnity and reimbursement by the owner. This interest, indeed, leans rather to the

owner than to the libellants, for if the bottomry contracts are defeated by his testimony, his liability to the lenders would be discharged by their release, and they be limited to their rights against the vessel and owner for the moneys advanced for the necessary refitment of the vessel, (*Bee's Adm.* 252; 2 *Peters' Adm.* 295,) and the master would only be answerable to him for integrity and good faith in his conduct. The admissibility of the master as a witness to bottomry contracts is placed by the judges sometimes *on the necessity of the ship*. Judge Livingston says, unless masters be admitted as witnesses in cases of this kind, it will be extremely difficult to ascertain whether such a necessity existed as would justify their taking up moneys on their owner's account. (2 *Caines*, 77.) The objection to the competency of the witness cannot, therefore, prevail; it can, at most, only go to his credibility.

There can be no doubt of the authority of the master to borrow money on bottomry of the vessel. (*Abbott*, 117-131, *ed.* 1829; *Curtis on Seamen*, &c. 175.) The previous contingencies upon which his power may be exercised embrace his destitution of funds in foreign ports, and all the occasions occurring abroad, which render money necessary to enable him to complete the enterprise in which the vessel is engaged, whether the necessity arises from an extraordinary peril or misfortune, or from the ordinary exigencies of maritime adventures. The master, under like emergencies, may borrow money at marine interest, and pledge the ship and freight to be earned on the voyage for repayment at the termination of the entire voyage, or an intermediate port of it, and may also draw bills of exchange, which the owner is bound to accept. (*Mil-*

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ward v. Hallett, 2 *Caines*, 77; *The Tartar*, 1 *Hagg.* 3; *The Nelson*, *Ib.* 179; *The Jane*, 1 *Dods.* 466.)

This general doctrine is not in question in this issue, but the owner and claimant contended that there was no necessity justifying a bottomry loan; that the master had funds in hand from freights sufficient to meet the wants of the vessel, and accordingly the loans were not warranted by the maritime law; that the loan was made by the consignee of the ship, and that the master had no right to hypothecate the ship in his favor.

This objection lies substantially to both hypothecations. Upon this latter point there was for a time some uncertainty in the books, because it was considered as conducive to surreptitious and covinous practices between the master and consignee in remote ports. (3 *Johns. R.* 352; 1 *Wheat.* 96.) No case of authority has, however, repudiated such bonds, and the decisions acquiesce in them, if not positively sanction them. (*The Tartar*, 1 *Hagg.* 1; *The Zodiac*, *Ib.* 320.) Lord Stowell, in repeated instances, develops the policy and ethics of bottomry transactions. He says, the loans are to be taken when the owner was known to have no credit, nor resources for obtaining necessary supplies. It is that state of unprovided necessity that alone supports these bonds. The absence of that necessity is their undoing. If the master takes up money from a person who knows that he has a general credit in the place, or at least an empowered consignee or agent there willing to supply his wants, the giving a bottomry bond is a void transaction, not affecting the property of the owner, and only fixing loss and shame on the fraudulent lender. But where honorably transacted, under an honest ignorance of

this fact, an ignorance that could not be removed by any reasonable inquiry, it is the disposition of this Court to uphold such bonds, as necessary for the support of commerce in its extremities of distress, and, as such, recognised in the maritime codes of all commercial ages and nations. (*The Nelson*, 1 *Hagg.* 179; 3 *Ib.* 74-163.) The objection that the bottomry holders are consignees of the ship, is obviated by the proof that they were not so by the appointment of the owner. They did not know each other; had no commercial relations; and, also, that the owner had no funds in their hands. The necessity of the loan is proved by the master. He says, the ship had been greatly injured by rubbing upon the rocks in the river Orinoco, and that upon a survey, the surveyors required that she should be overhauled and repaired; that he was absolutely in want of money for supplies, and that he could not leave St. Thomas unless he could have the money; that he applied to various persons without success, and he could not get the money unless he would secure the loan by bottomry. He knew of no other resource; he had none himself, and without this advance he would be unable to prosecute his adventure.

The further objection is taken, that the moneys loaned were lent upon the personal credit of the master. That would make no difference, provided the advance was made on an engagement for a bottomry security; and it is clear, from the proofs and the circumstances of the case, that the understanding of the parties was, when the advances began, that they were to be secured by a bottomry of the ship. (*La Ysabel*, 1 *Dods.* 273; *The Virgin*, 8 *Peters*, 538.) This is usually so, for

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it is difficult to ascertain the precise amount requisite until the repairs are made and the supplies obtained. Lord Stowell remarked, upon a similar objection, that it was the understanding of the parties at the time, that the money should be secured by means of bottomry; and that it was of no consequence whether the money was advanced at once, and the bond immediately entered into, or whether the master received it from time to time, in different sums, and gave a bond for the whole amount. (1 *Dods*. 273; *Hurry v. Hurry*, 2 *Wash. C. R.* 145; *The Aurora*, 1 *Wheat*. 96.) It is further objected, that the master disregarded the instructions of the owner as to the voyage, and that the lender, upon due inquiry, might have learned this fact, and his negligence in this regard should avoid his bottomry security. No fraud is any where charged in the pleadings, no connivance or unfair dealing is set up, nor is it asserted that the lender was aware of any instructions received by the master, from the owner, which had been disregarded. If the master had deviated from instructions, and there was no connivance on the part of the lender, he will not be affected by the fact, without clear evidence of notice to him before his security was taken. The proof shows no want of good faith on the part of the master. By his correspondence he kept the owner fully informed of his situation, and solicited directions. When he arrived at Bordeaux, no instructions were given, other than to exercise the broadest discretion. The lenders, also, are to be presumed to have acted in good faith. The necessities of the vessel, her want of repairs and supplies, that the master had no means of his own, and had in vain resorted to others for raising money on bottomry, were facts of

notoriety. If, in addition to such circumstances, the lender is required to give positive proof that the necessity of the master was absolute and remediless but by a bottomry loan, the doctrine would be disastrous to commerce, by destroying confidence in such securities, or rendering it impracticable to negotiate them. It is well established by the evidence that one if not both the bonds were taken for a larger amount than was required at the time for repairs and supplies to the vessel. There is included in one the wages of the master and expenses of board here and at St. Thomas, and in the other, advances to meet liabilities or necessities it was anticipated the vessel might be under after leaving Bordeaux, and in her after employment.

These are not particulars for which the vessel can be subjected by the master to a bottomry charge, but such irregularity in the bond does not destroy its obligation. These items of excess may be expunged. A bottomry bond may be good in part and bad in part, and it will be upheld by Courts of Admiralty as a lien to the extent to which it is valid. Courts of Admiralty are not, in this respect, bound to the strict rules of the common law, but decide upon the broadest principles of equity. (*The Augusta*, 1 *Dods*, 283; *The Tartar*, 1 *Hagg*, 1; *The Virgin*, 8 *Peters*, 538.)

The reference to be made in the cause will provide for a specification of the particulars composing each bond, and when and for what causes the money was obtained.

Upon full consideration of the merits of the case, I am of opinion that both hypothecations are valid in law, and that the respective libellants are entitled to have their remedies enforced against the fund in Court.

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That fund is brought into Court upon a demand for seamen's wages earned on this voyage. Those wages are to be first satisfied out of the fund. (1 *Dods*. 40; 2 *Dods*. 13; 3 *Hagg*. 407; 4 *Cranch*, 328; 1 *Paine*, 671.) Both hypothecations being deemed by the Court substantially valid, and no sufficient cause in the opinion of the Court being shown for giving, between the two, priority of satisfaction to Bujac's or the elder bond, the ordinary privilege in bottomry cases, (*Abbott*, ed. 1829, 128; *The Sydney Cove*, 2 *Dods*. 1,) must prevail here, and the bond to Furniss & Co. will be entitled to be first paid out of the proceeds. But both decrees in these causes are entitled to priority of payment over the mortgage lien of the claimant. (3 *Kent's Com.* 358; 2 *Hagg*. 294.) The clerk, on the reference, will ascertain and report to the Court the particulars composing each bond, and the time and occasion upon which the advances were made by the obligees, to enable the Court to reform, if necessary, the amount legally secured by the bottomry hypothecation.

It is therefore adjudged, that the libellants respectively recover the amount of their said bottomry bonds, with the marine interest reserved thereon, and six per cent. on the sum of such principal and marine interest, computed from the time of the falling due of the respective bonds to the day of this decree, together with their costs to be taxed; and that the decree in favor of Furniss & Co. on the junior bottomry be first satisfied out of the proceeds of said vessel, her tackle, &c., in Court, subject to such deductions and reform of the amount as may be thus ordered by the Court, on the coming in of the clerk's report in the premises, and it is referred to the clerk to ascertain and report the

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amount payable to the libellants, upon the said bonds respectively, conformably to the principles of this decree.

THE BRIG ORIOLE.

A libellant has the right, at any stage of the cause, voluntarily to discontinue the same; and the only penalty to which he can legally be subjected is, the payment of the costs of the proceedings.

The Court will not, upon a summary application of a claimant, inquire into damages caused him by an unfounded arrest of his ship.

Nor will it assume power to coerce parties into issues not raised in the pleadings filed in the cause.

BETTS, J.—A motion is made on the part of the claimant to compel the libellant to file additional stipulations in the cause, and that the Court award out of such securities an adequate indemnity to the claimant for the wrongful and injurious prosecution of this action.

A libel was filed upon a bottomry bond, purporting to have been executed by the master of the brig, in a foreign port; and she was arrested thereon on or about the 7th of February last. On the 6th of March, the libellant caused to be entered on the rule book in Court an order discontinuing the suit, and directing the vessel to be discharged from arrest. Notice of such discontinuance and discharge was served the same day by the proctor of the libellant on the proctor of the claimant, with an offer to pay the claimant's costs, as soon as they should be taxed. This offer, the proctor de-

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poses, he has been and is now ready to fulfil, but that the costs have never been taxed or presented by the proctor of the claimant.

The claimant insists that the libellant cannot voluntarily withdraw from the Court of Admiralty after a proceeding *in rem*, and that the Court will retain the cause until full justice can be rendered the claimant for the unfounded and illegal attachment of his property, and determine the amount of damage sustained by him in being deprived of the possession and employment of the brig by means of the arrest.

It is argued, that there is a fundamental difference in this respect between the functions of an Admiralty Court, and those of Courts of law or equity. In the latter it is not denied that the prosecuting party may relinquish his suit at any stage of it, and withdraw from Court at his own option, and without other liability to his adversary than the payment of taxable costs which have accrued up to the time of the discontinuance. (1 *Tidd. Pr.* 628; *Graham*, 494; 1 *Cowen*, 47.) No authority is produced establishing the distinction claimed in respect to Admiralty suits, and I do not discover any principle upon which it can be maintained.

The immunity of the respective parties, *pendente lite*, in respect to the subject matter of the suit and the expenses of the action, may be secured with more promptitude and efficiency in a maritime Court than at law; but the jurisdiction exercised before either tribunal, in that behalf, springs from a common principle, and is directed to the same end.

The stipulations in the one case are exacted, enlarged or modified by the summary action of the Court, but

only for the same object that security for costs are coerced in the other, that the successful litigant may be assured of the *costs* that may be ultimately awarded him.

When a litigation is urged through all its stages, and the final decree in an Admiralty Court dismisses the libel, discharges the respondent from arrest, and restores the property seized, nothing is adjudged affirmatively to the successful claimant other than his costs and expenses. So, if the action is defeated at the instance of the respondent at any point of its progress, or at its inception, because of informality or insufficiency of its processes, the decree still is simply that the property be restored, or the respondent freed from arrest, and that the libellant or his stipulators pay the costs specifically named, or those to be taxed, according to the standing rates of the Court. And upon what reason can a different principle be introduced and enforced, when the actor comes into Court and voluntarily desists from further pursuing his demand? No doctrine of the law is indicated which would render his liability, in such a case, greater than if he had persisted in an unfounded suit, so long as a standing in Court was allowed him. In the latter case, it is clear the decree against him is for nothing beyond a fair indemnity for expenses in the name of costs, and is never enlarged to a peremptory detention of the promovent in Court, to abide a trial upon counter-claims preferred against him by the adverse party, and it seems to me that such is the limit of the remedy against him in this behalf, when he relinquishes and abandons his action without bringing it to the judgment of the Court.

Moreover, what would be the method or *modus*

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operandi employed by the Court in exercising the jurisdiction invoked in this case?

The claimant alleges, as one gravamen, that by the arrest of his vessel he has lost the profits and advantage of a charter-party agreed for.

How is the *fact* to be ascertained by this Court, and if established, on what mode of proceeding is the amount of damages to be determined?

The Court would not act in these independent matters summarily, or on the depositions of the demandant, and it would have no power to coerce both parties into issues and litigations not embraced in the action instituted.

Costs are not a constituent element of an action. They never become a point of issue and contestation on trial. They did not even exist at common law as incidents of a suit, but are creatures of statute, or else in those tribunals possessing power to deal with the claims of suitors *ex conscientia*, together with their legal rights, are employed as a means of measuring out justice between litigants in relation to expenditures caused by the litigation. (*Kneass v. Schuylkill Bank*, 4 Wash. C. R. 106.)

Admiralty, which uses a freer discretion than Chancery in this particular, although, as a general rule, it gives costs to the party prevailing in the action, will still modify, divide or withhold them in correspondence with the intrinsic justice of the cause, irrespective of the ultimate judgment on the issues. (*The Partridge*, 1 Hagg. 81; 1 Hagg. (Eccl. R.) 210; *Read v. Harris*, 3 Dall. 34; *Penhallow v. Doane, Betts' Pr.* 120.) But I find no recognised usages in these Courts sanctioning the notion that a libellant can be restrained from with-

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drawing his suit, and be, by the power of the Court, converted into a defendant, and be proceeded against in that capacity for the adjustment of such a demand against him on the part of the respondent.

The motion must be denied.

THE COAL BOAT D. C. SALISBURY.

A mariner, rendering services on board of a vessel carrying coal between Philadelphia and New-York, upon tide waters, though she be stripped of sails and masts, and be towed by steamboats, may proceed *in rem* against such vessel for his wages.

Every service rendered by a mariner, contributing, in contemplation of law, to the management, safety or benefit of the vessel, is so far maritime as to carry a privilege against the vessel.

The services will be deemed maritime if substantially performed on waters within the ebb or flow of the tide.

If the services of libellant were those of *master*, or were merely those of taking and discharging cargo at the wharves, and in no way connected with the navigation of the vessel, the lien would be denied.

A. Nash, for libellant.

G. R. J. Bowdoin, for claimant.

BERRS, J.—The boat was arrested *in rem* for services by the libellant on board, in loading, navigating and unlading her. It was admitted by the respondent that five dollars was due for his labor; and the question raised and discussed by counsel is, whether the libellant for this claim has a lien upon the vessel which can be enforced in this Court.

The boat is of about forty-four tons burden, and is

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licensed and enrolled as a coasting vessel. Her employment, since the libellant was attached to her, has been in transporting coal from Philadelphia to New-York by the way of the Delaware river and the Raritan canal and river. She is towed by steamboats to, through and from the canal, and the men on board perform no other seamen service in her navigation on tide waters than aiding in steering her at particular times of tide, and occasionally at particular points on the passage. The case is distinguishable from that of *Davis v. The Lake Boat Enterprise*, decided in this Court in October, 1842, and the cases before Judge Randall, in the Pennsylvania District Court, cited on the argument, for in each of those cases the hiring was essentially for services on canals, and those rendered on tide water were merely incidental.

Here, so far as the circumstance of the *locus* affects the question, the principal service was to be rendered in navigating to and from the canal on tide waters.

In reducing the controversy to this point, there is left for consideration only the inquiry, whether these particular services were of a maritime character, and on board a vessel subject to the maritime privilege.

The claimant contends that the circumstance of the boat not being self-impelled takes her out of the class of vessels subject to liens for wages.

If she was used chiefly on a canal or internal waters, or only as a lighter in removing cargo to or from a vessel, or in carrying produce to market and managed by landmen; or if she was one of those small floats or craft attached to other vessels, and employed in no other way than as adjuncts or assistants to such vessels, the boatmen might have a difficulty in maintaining a lien

upon her for their labor. Should this be so in respect to equivocal cases of that class, it seems to me there is a difference between them, and one where a vessel has all the properties of a sea vessel except the use of self-propelling means ; and that an exemption from lien placed on the latter circumstance must be attended with great perplexity and ambiguity in its application.

If a vessel of forty-four tons burden, employed in carrying freights coastwise from one State to another, because having no sails or propelling machinery is excluded from the class of maritime vessels, what principle would bring one of ten or twenty times that burden, under like circumstances, within the class? Or upon what basis is the rule to be established, that upon vessels not having, or not using self-propelling means, the boatmen or hands can have no lien, while upon the other class they shall have a charge, with the right of enforcing it in Admiralty?

I assume it will not be controverted, that a ship or schooner, brig or sloop, with all her rigging and tackle on board, would be subject to the lien of her crew for wages, though towed by a steam vessel from Philadelphia to New-York, and never, in any way, on the voyage, employing her sails, or even having her rudder moved by the crew. The kind or amount of duty performed by the men on shipboard in no way determines the character of their remedy. They are there to serve as directed, and those engaged in the lowest and least valuable grades of service have a common privilege for the recovery of their wages with pilots, sub-officers and sailing masters. And in relation to the craft itself, there is no distinction between one so equipped, and the like ves-

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rel stripped of sails and masts. And accordingly, should it become the course of the coal-trade between Philadelphia and New-York to dismantle of rigging and spars the large vessels now employed in that navigation, and using only their hulls, have them towed by steam-tugs, the men engaged in the management of such vessels would be no less entitled, because of that change of apparel and method of management, to proceed against them *in rem* for the security of their wages. It is never a question how far one shipped to sea duty actually aids in the navigation of a vessel, or in what way his services are rendered, in order to determine his right to a lien. If he is attached to her, ready to render such services as may be required of him in his place, it is sufficient; every service rendered on board which contributes, in contemplation of law, to the management, safety or benefit of the vessel, has a maritime character and privilege.

Thus stewards, carpenters, chambermaids and surgeons have their lien for wages the same as if stationed before the mast; the law regarding the ship's complement as all ministering to the aid and protection of the vessel on her voyage, and never stopping to ascertain or inquire the quality or value of the service of the one in comparison with that of another.

In the case of the steamboat *Thomas Jefferson*, the Supreme Court held that the service was to be deemed maritime, if substantially performed on waters within the ebb and flow of the tide. (10 *Wheat.* 428.) This was no doubt decided essentially in respect to services, admitted to be of a maritime character, if performed at sea; but yet the case carries an import beyond any special regard to the kind of labor, and implies that the

ship's company any way employed in duty on board on tide waters, are entitled to the privilege.

Judge Hopkinson struggled earnestly to discover a rule which should fix with precision the discrimination between services essentially maritime, and those claimed to be such from being merely performed on shipboard at sea or on tide water, (1 *Galp.* 524, 526; *Ibid* 514,) and was free to acknowledge his want of satisfaction with the effort.

He may have suggested instances not falling within the doctrine, but his admission of the scope of the rule is ample enough to embrace the case of a crew attached to a licensed coaster, passing from State to State through tide water. He concedes that it applies to river craft navigating the Delaware on tide water, and its force would not be diminished if the vessel, adding thereto the transit of a canal, performed another tide water voyage to the place of her destination.

I suppose that there is no ground for question that this coal boat, employed as a freighter, would be subject to a lien for the libellant's wages on board, if she had been worked on her voyage by aid of his bodily labor, with oars or setting-poles; for the law does not impart to a service on shipboard the character of maritime, for the reason that it is applied to the vessel in any special manner, or that she is moved by its agency or otherwise; nor that the service requires nautical experience, or skill, or aid on the part of the crew; it is so only because the vessel is on a sea voyage, and the crew is employed some way to assist in furthering it.

I cannot perceive that there is any difference in principle whether the means of motion are derived from or controlled by the crew, or are contributed *abundant*.

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The quality, or quantity, or source of the motive power might enhance, diminish or dispense with the labor of the crew, but could supply no criterion by which to determine whether their services during the passage were *maritime* in character; and I cannot, in view of the principles recognised in the adjudged cases, discover any principle governing the question other than the simple one before indicated, that the vessel is engaged in a maritime voyage, and that the party seeking a lien upon her was hired and rendered services on board connected with her employment.

In the case of the tow-boat Ontario, decided in this Court in 1838, and affirmed on appeal to the Circuit Court, the lien was denied for two reasons—1. That the libellant, if connected with the boat in any manner, was so as *master*, and not as a hand or mariner; and 2. Because the services were merely those of taking in and discharging the cargo at the wharves, and in no way connected with the navigation of the vessel on tide water.

But it seems to me, upon the brief sketch of facts furnished in this case, that I am to regard the libellant as hired to perform all the services on board this vessel required in her loading and unloading, and in effecting her passage up the Delaware, on tide water, down the Raritan, through the Kills, and across New-York Bay, all also tide waters. In this shape of the case, his right and remedy cannot be affected by the method of her being propelled, or the degree of aid contributed by him to her navigation.

The demand is trivial in amount, but the principle which determines it must be the same as would have governed the case had a whole year's wages been in arrear.

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This case also in some measure illustrates the utility of the rule as applicable to vessels of this description. The answer denies the right of the person hiring the libellant to give him any security on the vessel for his wages; and without this remedy, men of his class might often be put to great difficulty and expense in finding and charging the proper persons with the payment of their earnings.

If it is understood that the vessel stands responsible on such contracts to her men, it gives the assurance of prompt and full payment for their labor, and this important and growing branch of trade, as well as others under like circumstances, will have at command all the services that may be demanded to insure its active and profitable prosecution.

I shall, therefore, order that the libellant recover five dollars, the balance of wages admitted to be due him, and summary costs, to be taxed.

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A vessel, in point of fact, for 12 or 14 hours in a condition where her instant destruction was menaced, and the lives of those who might remain on board of her greatly jeopardized, may be rightly taken possession of by salvors.

Parties taking such possession have a right to retain it until the salvage is completed, and no other person has the right to interfere with them, provided they are able to effect the salvage, and are conducting the business with fidelity and vigor.

In this country, it is clear that salvage compensation may be obtained in Admiralty for services rendered within the ebb and flow of the tide, without regard to location, whether on the high seas, or *inter fauces terra*.

The common law "wreck of the sea," if found within high-water mark on shore, is within the privilege of salvage.

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By the principles of maritime law, those beginning a salvage service, and in the successful prosecution of it, are entitled to be regarded as the meritorious salvors of whatever is preserved, even if wrongfully interrupted in the work by others who complete the salvage.

Not only the actual toil and expenses are to be considered in a case of salvage, but also the imminent contingency that their services might prove unavailing by the breaking up of the vessel, before any amount of property could be saved.

Mr. Lord, for libellants.

Mr. Bidwell, for claimants.

BETTS, J.—This is a cause of salvage. The material facts are as follows: The brig, in attempting to go to sea on the afternoon of the first of January, 1841, grounded on the *outer* middle, in the harbor, below the Narrows, and from one to two miles off shore. It was then snowing, and the wind blowing heavily from the northeast.

A boat's crew was sent off from the brig to Staten Island, to obtain a lighter, and in her absence every effort was made on board, and with the aid of the steamboat Osiris, to draw her off the bank, but without success. It was near night when the boat returned to the brig, and a lighter came down about the same time; but the brig was then bilged, her masts had worked loose in their steps, and the master supposed they must go overboard. Water was in the hold and cabin, and the ship's company were exposed to the storm and sea on deck, while the vessel was so careened as to render it difficult to maintain a standing upon her.

The master, pilot and brig's company left her in the lighter, without attempting to take out of her the valuables on board at all, more than a part of their clothing.

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The storm and wind was then increasing, and the master of the lighter declared it unsafe for his vessel to remain out and near the vessel during the night. He returned to Staten Island with her, taking the two mates and one or two of the men. The master, with the rest of the crew, went up to the city in a steamboat, which was met coming down to their relief.

The time at which the lighter arrived at the Island is not clearly stated, but most probably it was between 7 and 8 P. M. Some of the witnesses supposed it was later.

The same evening, and within an hour after her arrival, the libellants put off for the wreck. The storm was still severe and unabated, but the wind was beginning to bear round to the northwest.

The libellants are wreckers, and keep a vessel and crew in readiness to go out during the winter to the aid of vessels requiring assistance in the harbor and off the coast.

The claimants allege that the master of the first lighter, the Hiram Dixon, was employed by the master of the brig to return immediately to her with his lighter, and keep by the wreck until assistance could be sent down from the city by the owners.

There is great conflict of testimony upon this point, but I find the preponderance of evidence to be, that no such engagement was entered into. The Hiram Dixon, on her return, had discharged all the duties she was engaged to perform in respect to the wreck. I do not, therefore, discover any foundation for the charge, that a fraudulent arrangement or confederation was entered into between the libellants and the master, or any of the crew of the Hiram Dixon, or that the libellants

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went down to the vessel and surreptitiously took possession of her with intent to supplant her master and owners in giving her relief.

Even had the asserted engagement with the Hiram Dixon been proved, such an arrangement could not well be made a continuing possession of the brig, so as to oust, or extinguish all right of the libellants to hold her as salvors, having gone aboard and taken charge of her in the perilous condition in which she was found.

It is to be observed it was then mid-winter, at the height of a northeast storm of wind and snow, in the night time, and that the brig lay at a point most exposed to danger from the wind and waves coming upon her from that direction, and that there was every probability she must be immediately broken up, causing the loss of every thing on board.

She was apparently abandoned, and if her crew might have been absent to procure assistance from other vessels and more force, their ability to return to the wreck or the chance of affording any aid after the lapse of a few hours, must, in the then condition of things, have been most dubious contingencies.

The libellants, in the exercise of their calling as wreckers, coming to a vessel in that plight, would be guilty of a dereliction of duty if they failed to employ all their means for the instantaneous preservation of property so circumstanced.

This may not be strictly and technically a case of derelict, (*Clark v. The Brig Dodge Healy*, 4 Wash. 651,) if really the master of the brig had gone to the city to obtain the necessary help to save the cargo and brig, intending, at the time, to return with all practicable dispatch. It appears he came to the wreck by 8 or 9

A. M. the following day, in a steam-tug, with men to assist in saving the cargo. The *animus revertendi et recuperandi* may thus far have continued with the master, but this mental hope or purpose must be regarded inoperative and unavailing as an actual occupancy of the vessel, or manifestation to others of a continuing possession. She was absolutely deserted for 12 or 14 hours in a condition when her instant destruction was menaced, and the lives of those who should attempt to remain by her would be considered in highest jeopardy. She was quite derelict; and being thus found (*The Boston*, 1 *Sumner R.* 334; 1 *Mason R.* 272; 1 *Sir Lionel Jenkins*, 89) by the libellants, the possession they took of her was lawful. (*The Schooner Emulous*, 1 *Sumner*, 207.)

Possession being thus taken when the vessel was, in fact, abandoned and quite derelict, under peril of instant destruction, the libellants had a right to retain it until the salvage was completed, and no other person could interfere against them forcibly, provided they were able to effect the purpose, and were conducting the business with fidelity and vigor. (*Abbott*, 554; *Holt on Shipping*, 522; 1 *Edw. R.* 175; 3 *Hagg.* 159, 160, 161; *Ib.* 167, 243 & 385.) The argument, that the brig not having been out to sea when wrecked, varied the relation of the parties, has no foundation in law or reason. The exigency was no less imminent that immediate relief should be afforded her; nor have merchants and underwriters a less interest that prompt and efficacious assistance be rendered vessels imperilled in great bays and roadsteads, than if they happen to be outside a harbor; and that the stimulant, inducing aid, be applied, by constituting those who

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render it, salvors. The doctrine is clear in this country that salvage compensation may be obtained in Admiralty for services rendered within the ebb and flow of the tide, without regard to location, whether on the high seas, or *inter fauces terræ*. (1 *Sumner*, 210, 328; *The American Insurance Company v. Carter*, 1 *Peters*, 511; *Hobart et al. v. Drogan et al.* 10 *Peters*, 108; *United States v. Coombs*, 12 *Peters*, 72.) And there is no apparent reason why the rule should be restricted to tide waters, and not embrace all navigable waters out of the jurisdiction of any particular State. This principle would seem to bring the common law "wreck of the sea," if found within high water mark on shore, within the privilege of the law of salvage. (1 & 12 *Peters*, *before cited*.) The English rule is not in conflict with the American, (*The Euraces*, 1 *Robinson*, 15; *The Frederick*, *Ib.* 229; *Westminster*, *Ib.* 172,) except, perhaps, in the particular of the wreck of the sea. (*The Augusta*, 1 *Hagg.* 17; *Holt*, 522.) Justice Story, commenting upon this distinction, in *United States v. Coombs*, says: "It is true that it has been said that the Admiralty has not jurisdiction of the wreck of the sea. (3 *Black. Com.* 106, 107.) But we are to understand by this, not what, in the sense of the maritime and commercial law, is deemed wreck or shipwrecked property, but 'wreck of the sea,' in the purely technical sense of the common law. A passage has been sometimes relied on, in one of the earliest judgments of Lord Stowell, the case of the *Two Friends*, (1 *Rob. R.* 271,) in which it is intimated that if the goods, which are subject to salvage, have been landed before the process of the Admiralty Court has been served upon them, the jurisdiction over them, for the

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purpose of salvage, may be gone. The supposed difficulty in that case was not that the Court had not jurisdiction; but that in cases of salvage on the instance side of the Court, no process of the Court could be served on land, but only on the water. This exception is inapplicable to the Courts of the United States, where Admiralty process, both on the instance and prize side of the Court, can be served on land as well as on water."

Had the crew of the brig been in sight in a boat, or on shore, after abandoning the vessel, and evincing no intention to return, and being unable to relieve her, those who should come to the rescue of vessel or cargo, would acquire the rights and privileges of salvors.

The evidence shows that the libellants, after falling in with the wreck, applied all the means and diligence within their power, and which the circumstances of the case admitted, in saving the property. It further appears that Roff, the master of the salving vessel, was skilled in this business; is a man of energy, and that he not only exerted whatever means he possessed, but engaged men and vessels to aid him wherever they could be advantageously employed. Whilst so engaged, the master of the brig returned to her, and demanded the possession to be surrendered to him. The libellants refused compliance with the demand, asserting that they were legally in possession of the brig as salvors, and should retain it in that character. Roff said he had found her there stranded and deserted, no one being with her or keeping guard of her, and he intended to hold her, and save the cargo. Henry Dixon testifies that he went down to the brig about 9 o'clock, with her master, in the steam-tug Hercules, who went aboard

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with the witness; told him that the brig was in charge of the wreckers, and witness must make arrangement with Roff, and go to work stripping her. Roff hired the riggers brought down by the master, and employed them to help dismantle the brig. The master would have no rightful authority, on such facts, without tender of a full satisfaction to the libellants, to exact the surrender of the vessel to him, she being aground and helpless, and not in a salved state, or capable of being restored to the owners; and the facts abundantly show, that the change of possession could not have been then made without involving the probable loss of vessel and cargo. The master, with his crew, left the brig under the belief that she must go to pieces that night; he gave no intimation of returning to her; she lay in a perilous position, on her beam ends, filled with water to her hatches, and the sea making a breach over her. The storm continued raging that night, and the sea was so rough that it was impracticable for any other craft than small vessels to be brought alongside, or made useful to the brig or her cargo. The master had come down in a steam-tug, without lighters, to aid in unlading the cargo; and all the testimony shows that no effective assistance could have been rendered the wreck, except by such lighters, nor was it intended to use the tug for any further purpose than to bring the master and his few attendants to the wreck.

In the afternoon, an agent for the owners came to the brig in a steam-tug, with men engaged to assist in saving the cargo, and demanded possession of her from the libellants. This demand, as before, was disregarded, but Roff declared his willingness to employ the men brought down, if they would work, and did engage all

who consented to stay with him. At the close of that day, Roff was arrested under the directions of the owners, by a deputy marshal of the United States, and taken forcibly from the wreck to the city, and the agent took possession of the wreck for the owners, turning the libellants out of her. The warrant was obtained on a charge of larceny, committed by Roff, on board the wreck. The agents of the owners and underwriters, after the dispossession of the libellants, conducted operations for saving the cargo, until the brig, four days afterwards, went to pieces, and was totally lost. It is not necessary to determine whether, if the vessel had been afloat, and being brought into port, the law would have entitled her owners to possession, to the exclusion of the salvors, to complete the salvage themselves; and if so, on what terms or conditions; because here, most probably, the vessel could not be surrendered to them as saved, nor was the interposition of the owners necessary for the rescue of the property. The result proved they were unable to effect it. The dispossession of the libellants, then, in successful operation, was, under the facts, clearly wrongful; and in respect to Roff, accompanied with circumstances of extreme aggravation. No justification is shown for his arrest on a criminal charge. It was manifestly employed to make him give up the brig, and the proceeding was dropped so soon as his removal was accomplished. The unquestionable responsibility of the owners and underwriters imparted no privilege to them in respect to the salvors, which could not be claimed by strangers or owners, without responsibility; and, in my opinion, they had no authority to force the vessel and cargo out of the possession of the salvors, without making or tendering them

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full remuneration for the services already performed by them. The Court cannot, however, act upon that proceeding as ground for damages or otherwise, in so far as the false imprisonment or tortious arrest of Roff is concerned. The remedy for that wrong must be sought elsewhere; but it is in consonance with the established principles of maritime law to hold those beginning a salvage service, and who are in the successful prosecution of it, entitled to be regarded as the meritorious salvors of whatever is preserved, and entitled to the sole possession of the property; (1 *Ld. R.* 393; 2 *H. Black.* 294; 1 *Saund.* 265; 8 *East*, 57; 1 *Dods.* 417; 2 *Hagg.* 361; 3 *Ib.* 160, 167, 243; *Edwards R.* 175;) and the same would seem to follow, even if they have been wrongfully interrupted or intercepted in the work by others, who complete the salvage, and bring in the salvaged property.

It does not become necessary, in this case, to consider minutely the course of conduct pursued on board after the libellants were dispossessed, because the amount of property saved furnishes adequate means for compensating them; but the testimony seems to call for the remark from the Court, that owners and underwriters would undoubtedly have been large gainers had the business been left in the hands of the first salvors. A great parade of force was made, and an enormous outlay of charges incurred, and yet the amount saved in the four days the wreck was under their charge, holds no corresponding proportion in favor of the owners to the beneficial services rendered by the libellants. The libellants were quietly, but most efficiently employed; they were industrious, untiring and fearless, and thoroughly acquainted with the duties required of them.

They had shipped and saved the rigging of the brig, loaded and dispatched one lighter, and half filled a second, before the arrest of Roff; and their enterprise promised a speedy and successful result.

In the account of sales of the property the owners do not fully discriminate between that saved by the libellants, and that sent up by those succeeding them. They credit the proceeds of property saved by Roff at \$5,494 85, but the rigging and materials are not included, and out of \$9,205 32, the proceeds of the cargo put on board the lighter, (W. S. Rost,) only \$1,058 65 are credited to Roff. The evidence affords strong ground in support of the claim of the libellants, that the latter vessel was half laden by them; and if the \$2,255 26 credited to materials, be the sails, rigging, &c., of the wreck, they belong also to the credit of the libellants. If the account is stated upon their allowances, then of the whole sum of sales, \$42,495 78, \$11,294 07 would be rightfully claimed by the libellants as the amount of the property saved by them. But this view of the case is not pressed, nor are the facts investigated with the intent to adjust fully the rights or equities that might attach, in favor of the libellants, to them; for whether the salvage service has been best performed by the one or the other set of salvors, could not vary the right of the libellants to their just compensation, and the amount restored to the owners by the different salvors affords ample means of remuneration to the libellants.

This is not a case for extravagant compensation, although the services were well timed, faithful and beneficial, and involved risks and fatigues beyond that of ordinary labor, and outrank a mere *quantum meruit*

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reward, (*The Hector*, 3 *Hagg.* 90, 95 ; *Ibid.* 120, 121 ; *Ibid.* 204, 205,) yet they are not entitled to be placed in the highest order of perils and salvage services. Still more than the actual toil and expenses are to be considered in view of the imminent contingency that their efforts might be unavailing by the breaking up of the vessel before any amount of property could be rescued. Under similar hazards, the English Admiralty awarded a liberal compensation for services in themselves attended with little danger or exposure. (*The Westminster*, 1 *Rob. Jr.* 229.) The imputations of embezzlement are not supported. The conduct of the libellants was unexceptionable, and is deserving a liberal consideration. If the amount of property saved by all had been small, I should apportion their compensation upon the aggregate so rescued from loss and destruction, regarding the libellants as equitably, and, according to the rules of maritime law, entitled to a reward for that brought in by those who supplanted them. But in the view I take of the evidence, it appears that the libellants got out of the wreck her materials, the full lading by the *Alice Ellis*, and one-half of the lading of the *W. S. Rost*, which, according to the account of sales rendered by the owners, produced \$11,294 07.

I decree that the libellants recover one-fifth of this sum, being \$2,258 81, and their costs to be taxed.

D. Lord, Jr., for libellants.

Griffin & Bidwell, for claimants.

THE MUTUAL SAFETY INSURANCE COMPANY, THE AMERICAN INSURANCE COMPANY, and THE JACKSON MARINE INSURANCE COMPANY,

vs.

THE CARGO OF THE SHIP GEORGE and its PROCEEDS *in rem*, and against REYEA & SCHLICK, of Trieste, (Austria,) OWNERS of the ship, and JOSIAH MACY & SON, and BARCLAY & LIVINGSTON, of New-York, holders of proceeds of cargo of the brig, *in personam*.

Assurers acquire by abandonment to them of property insured and satisfaction of their policies, all the present rights and remedies of the assured thereto, together with the *spes recuperandi*.

Those rights and remedies may be presented or proceeded upon in Admiralty Courts, by the assurers, in their own names.

Parties may have, in this Court, the same remedies against the proceeds of property, subject to its jurisdiction, that they are entitled to against the property itself, in whose hands soever the proceeds may be found.

Admiralty has jurisdiction of cases of general average upon losses at sea.

The voluntary stranding of a vessel, in peril of loss, with a view to save the cargo, although the vessel be thereby totally lost, is ground for general average, and the ship and freight, in such case, are subjects of average contribution.

The Federal Courts are governed, in commercial and maritime cases, by the general, and not by the local law.

The adjustment of average in case of sale of the goods at the place of disaster, before reaching the port of destination, may be in relation to the sale price.

When no sale is made at such place, the value, at the place of shipment, will govern.

The policies do not, of themselves, supply proof of the value of ship, cargo or freight, on general average.

But the adjusters can receive the policies as auxiliary evidence of those values.

Invoices and bills of lading are competent evidence of the value of the cargo at the place of its purchase and shipment.

The cargo and its proceeds are libelled in this action by three insurance companies, underwriters on ship and freight, to recover a contribution share on general

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average, claimed to be payable by the cargo on board the ship George, because of a voluntary stranding of the vessel by her master to save the cargo and freight. The underwriters had accepted the abandonment of the ship and freight after the loss of the ship, and paid a total loss on the vessel and freight.

The facts are as follows :

The George, being insured by the libellants, (all the three companies having underwritten the vessel to the valued amount of twelve thousand dollars, four thousand dollars each, and the Mutual Safety Insurance Company having underwritten the freight to the amount of \$4,400, on a valuation of \$6,800,) sailed in May, 1841, from New-Orleans to Trieste, with a cargo of cotton, consigned to the claimants, Reyee & Schlick. When about six days out, the vessel met with heavy weather, and sprung a leak. The leak increased, and the master, after making a fruitless attempt to reach the harbor of Nassau, finally, with the view to save the cargo from destruction, ran the ship on a reef, about three-quarters of a mile from the main land on the west end of the Grand Bahamas.

The vessel and freight were wholly lost, and after abandonment to the underwriters, a total loss was paid by them.

A large portion of the cotton was saved, and the proceeds came to the hands of the defendants, Macy & Son, as agents of Reyee & Schlick, and Livingston & Barclay.

The libel was now filed *in rem* against the cargo and its proceeds, on the ground that they were bound to contribute in general average to the loss of the vessel and freight, and *in personam* against the respondents, as holders of those proceeds or parts of the cargo.

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A foreign attachment was prayed against the defendants, Reyea & Schlick, and Livingston & Barclay, to make them personally liable for the funds in their hands, and also to compel the appearance of the owners of the cargo.

There was very little dispute as to the facts of the case.

The answer of Barclay & Livingston, the agents of Reyea & Schlick, insisted that the vessel was run on shore to save the lives of the master and the crew, and that the most expedient course had not been pursued in running the vessel on shore. The answer of J. Macy & Son admitted the proceeds of cargo to be in their hands, and disclaimed all personal interest in the subject matter.

The only witness examined on the hearing was Thos. S. Minott, master of the George. He testified that the vessel sprung a leak soon after leaving New-Orleans, and between the 17th and 22d of May the leak had averaged from two hundred to twelve hundred strokes of the pump per hour; that the water was four feet in the hold, and increasing, when he determined, on the 28th, to run the vessel ashore. The wind was light, with little sea. He testified positively that he ran the vessel ashore to save vessel and cargo, and that he did not consider any life on board in danger, as they had good boats, and the weather was moderate. That if the cargo had been thrown overboard, the leak might have been stopped, if it was in the upper works, but he did not know where it was. That he thought there was a chance, although a small one, of keeping the vessel free, even without running her ashore or throwing over cargo. That he selected the place of running

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her ashore with the view and in the hope of saving both ship and cargo.

An average statement had been made up by an adjuster, and was submitted to the Court by the libellants as the basis of the decree demanded.

Theodore Sedgwick, for the libellants.

The Admiralty has jurisdiction of a question of general average. (*De Lovio v. Boit*, 3 Gallison, 398.) He cited, also, *Curtis on the Rights and Duties of Merchant Seamen*, 217; *Abbott on Shipping*, p. 3, ch. 8, § 17; *The Hoffnung*, 6 Rob. Adm. R. 383; *Stevens on Average*, 50.

Daniel Lord, Jr., for respondents.

In New-York, where the contract was made, it is settled in a similar case, that no contribution in the nature of a general average is due. (*Bradhurst et al. v. Col. Ins. Co.*, 9 J. R. 9; 1 *Parke on Ins.* 280, ch. 7; *Phillips on Ins.* 102.)

The Court of Admiralty has not jurisdiction. (3 *Rob. R.* 298.)

If any average is due, Bermuda is the proper place of adjustment. (2 *Phillips*, 141 to 167.)

BETTS, J.—The main subjects of controversy in this case are:

The competency of this Court to entertain the action.

The right of the ship-owners to compensation on general average; and

The principles upon which the average contribution shall be adjusted and distributed.

The ship was totally lost and was abandoned to the

underwriters, who are the libellants in the action by virtue of that title. The abandonment conferred on them every interest and right in the ship possessed by her owners. They take all title and authority of the assured, even the *spes recuperandi*; his agents become theirs, and they stand subrogated to every privilege and power he possessed and might legally exercise. (2 *Condy's Marshall*, 601, *a. b.* ; 2 *Phillips on Ins.* 420; 7 *Cranch*, 268; *The Chesapeake Ins. Co. v. Starke*, 7 *Johns. R.* 412.)

If this complete substitution of the assurers in the place of the assured should fail to confer also the capacity to sue at law in their own names, they would meet no such technical impediment in this Court; an assignee of an interest may maintain an action upon his title as if originally vested in him. It accordingly presents no objection to the sufficiency of parties that the libellants sue in their own names or solely.

The objection to the jurisdiction of this Court over the subject of general average was earnestly pressed on the argument. No case, however, was produced in the American or English maritime Courts, in which the jurisdiction has been disavowed; and upon the criterion by which the capacity of the Court is determined, general average would seem to be a subject eminently adapted to its functions, and to be made up of those ingredients which constitute a maritime jurisdiction and require its exercise.

If not strictly international, it is cosmopolite in character, useful to the navigation of all nations, and everywhere recognised as an essential accompaniment of maritime commerce.

Its necessity is created by transactions at sea, and

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relates to the exigencies and liabilities of ships, cargoes and freights reciprocally to each other at sea, in respect to maritime disasters, in which the exposure is common to each, and especially when it happens that some interest is, wholly or in part, voluntarily sacrificed for the preservation of the others.

The rights springing out of that condition are recognised instinctively or by natural reason, and the primitive sea laws acted upon those rights, as subjects appropriate to their cognizance and authority. The civil law gave body and system to the usages and customs which had before prevailed in place of primitive law, and with the simplicity and practical equity which pervaded that polity, dealt directly with the property benefited or prejudiced by the sacrifice, and distributed between the two that which remained after the disaster in such ratio as to render the loss a mutual one to the owners of ship, cargo and freight, undergoing the common peril. The master of the ship became, in his official capacity, the minister of the law, who arrested and detained the property remaining; determined the amount of loss and the scale of contribution to be made and received by the respective portions of it, and carried the decision into effect by his own authority. The practical procedure in accomplishing this end is subject to regulation by the governments to which the vessels belong, but all the elements and gist of a general average, as recognised in its inception, and now administered by commercial nations, are maritime in their origin and nature, and appertain to the functions of maritime tribunals.

This was the understanding of the law by the old English civilians. Zouch says, "Admiralty Courts have

jurisdiction touching contributions to be made for loss upon occasions of common danger." (*Zouch, Assertion*, 3, art. 4, p. 32.) Godolphin enumerates carefully the subjects over which the Admiralty Courts had a clear jurisdiction, and says, "within the cognizance of this jurisdiction are all affairs at sea immediately relating to vessels of trade and the owners thereof;" also "all cases of *jactus*, or casting goods overboard." (*Oh*. 4, pp. 44, 169.)

Alexander, Justice, in a treatise upon the sea laws, published in London, 1705, reiterates this declaration, and commends Godolphin as an eminent and reliable authority upon the subject of Admiralty jurisdiction. (*Sea Laws*, 259.)

The more modern elementary writers evidently hold the same sentiments, although expressed with a perceptible dread of the despotism of writs of prohibition. Browne says, "If a party institute a suit in Admiralty in a cause of average and contribution, and *be not prohibited*, I do not see how the Court could refuse to entertain it." (2 *Browne Civ. & Ad.* 122.)

When objection was made to the authority of the Court to award average contribution, Sir William Scott yielded to the objections, but on two special grounds, first, that the claim was one of prize against a ship by captors of the cargo as prize of war. The cargo would have been entitled to average contribution as between its owner, and the owner of the ship. A part of it had been applied to repair the vessel before her capture. She was restored by the Court. The Court held, that as a prize Court, it could not take notice of a contributory liability of property, expended for the benefit of the ship, and that, though cases of average on the

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part of the ship against the cargo are not unfrequent, a demand of the cargo against the ship is perfectly novel. (*The Hoffnung*, 6 C. Rob. R. 383.) No intimation is given by the Court that it had no jurisdiction in cases of average. Its remarks strongly imply the contrary. In *The Gratitude*, (3 Rob. 255,) the implication is direct and forcible that cases of contribution are properly within the jurisdiction of the Admiralty. Mr. Abbott refers to the civil law as the source of the authority for enforcing average contribution, (*Abbott*, 361, § 17,) and its procedures were *in rem*, and belong now only to Courts of Admiralty. The doctrine of the American Courts is clear and distinct on this subject. Judge Story, in his thorough and profound discussion of the jurisdiction of the Courts, says, "it embraces contracts and *quasi* contracts respecting average contributions." (*De Lovio v. Boit*, 2 Gall. 475.)

In the *United States v. Wilder*, he says, "the general maritime law enforces a contribution in default of any notion of a contract, upon the ground of justice and equity, and is the only mode of remedy in many cases." (3 *Sumner*, 311. See, also, *Ship Packet*, 3 *Mason*, 261.)

The practice is familiar to the Courts. (*Dunlap Pr.* 57.) It seems peculiarly fitting the functions of the Court, no other tribunal having the faculty to compel property made liable to contribution by the maritime law, to fulfil that obligation.

A suit at law or in equity may be employed to obtain the value of the contribution; (1 *Smith's Mercantile Law*, 192; 1 *Law Library*, N. S. 115; 1 *Story Eq.* § 490;) but the proceedings can only be *in personam* at law, helped out by the fiction of a contract, (3 *Chitty Pleadings*, 87, 88,) where none subsists in

fact. And the interposition of equity affords no specific relief against the property, and is invoked rather to bring suitable parties into the controversy than to effectuate, by its direct action, the remedy the case requires. It will not even restrain the master from parting with the goods, if he thinks proper to do so. The civil law supplies the only *forum* adequate to the full necessities of the remedy. (*Abbott, ed.* 1829, 361-2, § 17.)

So, also, in my opinion, the parties entitled to a contribution can enforce their right by appropriate proceedings against the proceeds of the property, subject to make contribution in average, in whosoever hands those proceeds may be found; or against whatsoever represents that property, (without regard to a continuing possession of the goods, to which the right of lien or contribution attached. (5 *Peters' R.* 675; 4 *Wash. C. C. R.* 99, 100; 12 *Wheat.* 615; 11 *Johns. R.* 323; *Dunlap Pr.* 57; *Stevens on Average*, 25.) The owner, if a foreigner or non-resident, may be brought under the jurisdiction of this Court by suits of foreign attachment, so that the proceedings will be as efficacious against him, as if he were under personal monition or arrest. (*Munro v. Almeida*, 10 *Wheat.* 473.)

The point most contested on the hearing is involved in the objection that the ship-owner is not entitled to bring the value of the ship into contribution on general average, when the peril to which she was voluntarily exposed resulted in her total loss and destruction.

The facts of the case are free from all conflict; and upon the testimony of the master, it appears the vessel was voluntarily run ashore by him to save the cargo, the lives on board not being in danger, and was totally lost in consequence.

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The policy and justness of the rule which, in my opinion, warrants this demand, is clearly manifested by these facts, because, if the probable or even possible destruction of the ship might follow the act, the master would have no inducement to risk that sacrifice, if, when the total loss followed, no claim for indemnity could be maintained against the cargo and freight for whose benefit it was made. In this act are all the requisites to a case of general average.

The exposure of the ship to loss was voluntarily made by the master and crew for the common benefit of the shippers, and solely for the purpose of saving the cargo. It conduced to their preservation. The controlling test in questions of average is the voluntary placing of part of the property in peril by the master and crew, for the safety of the residue. (2 *Browne Civ. & Adm. Law*, 199; *Whittridge v. Norris*, 6 *Mass. R.* 125.) And in vindication of the soundness of the new rule, admitted in the American Courts, giving the value of the ship when she is totally lost a right to contribution, Ch. J. Tilghman, in *Gray and others v. Waln*, says, if the case is not one of general average, because the ship was totally lost, the result would be that for a small loss there shall be compensation, but a great loss is to go without compensation. (2 *Serg. & Rawle*, 229.)

To constitute a case of general average it is admitted to be essential that the ship and cargo should be in common danger, and that a part should be sacrificed for the preservation of the remainder, or, as is laid down by Emerigon, (*vol. i.* 603,) "le dommage n'est avoir grosse, que dans les cas ou il été opéré volontairement pour le salut commerce." All these ingre-

dients to a case of general average are proved to exist in the present instance, and it varies only from those described and approved in the earliest edicts and adjudications on the subject, in the feature, that the ship was subjected to a total instead of a partial loss, in the effort to save the cargo. This consideration augments the equity of the claim that such loss should be apportioned, and the property saved should contribute towards its remuneration.

The argument against the claim attempts to replace the old doctrine declared by Emerigon and sanctioned by the Supreme Court of New-York, excluding the owners of a ship totally lost from participation in the general average shared by the owners of cargo and freight. (*Bradhurst v. Columbian Insurance Co.*, 9 J. R. 9; *Emerigon*, vol. i. ch. 12, § 13, p. 614.) "It will be general average if the stranding has been voluntarily made for the common safety, provided, always, that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is, save who can." To do this effectually, the effort is made to distinguish the facts and principles acted upon by the Supreme Court of the United States and other American tribunals, from the broad and direct proposition presented by this case. But in my judgment no sound distinction can be shown between them, and the scope and force of the reasoning and conclusions of the Supreme Court embrace and dispose of every material question made upon that point in the case. Judge Story, in speaking for the Court, (*The Columbia Ins. Co. v. Ashby & Stribling et al.*, 13 Peters, 539:) Surely, says he, the question of contribution cannot depend upon the amount of the damage sustained by

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the sacrifice, for that would be to say, that if a man lost all his property for the common benefit, he should receive nothing; but if he lost a part only he should receive full compensation, and emphatically declares the law to be that a voluntary stranding of the ship, followed by a total loss of the ship, but with a saving of the cargo, constitute, when designed for the common safety, a clear case of general average. In this cardinal doctrine other influential decisions concur. The principle to be gathered from the new application of the rule is, that if the voluntary act of the master and crew is the direct occasion, the efficient motive and cause of the stranding, the loss becomes one of general average. (*Case v. Ruxley*, 3 Wash. C. C. R. 298; 2 *Browne Civ. & Adm. Law*, 199; *Whittridge v. Norris*, 6 Mass. R. 125; *Gray and others v. Waln*, 2 Serg. & Rawle, 229; *Sims v. Quincy*, 4 Binney R. 513.)

The Rhodian law, whence the doctrine of contribution is derived, is founded upon this principle, *jactus factus levandae navis gratia*. The particular loss incurred is elected, with a view to the safety of what remains. (2 *Condy's Marshall*, 536.) There is nothing in the adage of the Rhodian edict which imports that a partial injury of the property put in peril is all that is contemplated by the devotion of it to relieve the common peril; on the contrary, the larger doctrine has always been deduced from it, that as the jettison is unreserved, and may naturally result in the entire loss of the property abandoned to the risk, so the average remuneration shall correspond to and be measured by the degree of loss. (*Jacobsen Sea Laws*, 345; *Weshett Ins. fol. ed. title, General Average, Jettison*; *Abbott, ed. 1829*, 348; 3 *Kent*, 3d ed. 232.)

This reference to the foundation of the law of general

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average is sufficient to indicate that the application of its rules and principles by the Supreme Court of this State (9 *Johns. R.* 9) is in restraint of the exalted and comprehensive equity it is designed to accomplish in cases of common perils wherein the property of one is sacrificed to promote the safety of others standing in equal exposure.

Had the counsel then succeeded on this argument in raising a doubt whether the conclusions of the Supreme Court (13 *Peters*, 359) were in conformity with antecedent adjudications or usages on this subject, the doctrine of that decision supplies the more satisfactory exposition of this important branch of maritime law, and gives a rule eminently adapted to the exigencies of commercial navigation.

Independent of this acquiescence in the soundness of the views of the Court in that case, I should feel bound to conform to its expositions of the general principles and rules applicable to average claims, although the particular facts of this case may be shown not to be exactly coincident with those on which that judgment was founded. The leading feature of that case embodies the principle which controls this. But even if it could be demonstrated that the conclusions of the Supreme Court were speculative and hypothetical, the solemn enunciation and sanction of a rule of maritime law, by that high tribunal, would be a guide and light I should not fail to follow in the administration of that law in this Court.

In commercial and maritime questions, the Federal Courts are not governed by the jurisprudence of particular States, but by the general principles and doctrines of commercial law, or the law-merchant. (*Swift v. Tyson*, 16 *Peters*, 1.)

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I shall, therefore, hold the libellants, representing the rights of the owners of the ship, as entitled to contributions on general average upon her value, at the place of loss, notwithstanding she was totally lost by the stranding. The act was voluntarily done by the master with a view to the safety of the cargo alone. They are entitled to contribution toward the loss, from all that was saved, including cargo and freight. The ship, cargo and freight are to be estimated at their full value, at the place of stranding. That value will be ascertained on the adjustment of the average by appropriate proof. The invoices and bills of lading will be received as evidence of the value of the cargo at the place of purchase and shipment, and the policies may be consulted as evidence conducing to prove the worth of the ship at the port of departure, and the value of the freight lost. (3 *Kent*, 167; *Abbott*, 607; 2 *Condly's Marshall*, 618.) But additional evidence of the value must be produced. The principles governing the valuation between assured and assurers, are not conclusive in cases of average, because, in the first instance, the policy is the common act of the parties in interest, and may estop all question as to valuation, whilst on general average interests are brought in which are not controlled by the policy. Still I think the policies may be admissible before the adjusters as auxiliary proof of the value of the ship, cargo or freight.

The decree will be drawn up in correspondence with this decision, and all questions of law which may properly be raised on the proceedings of the adjusters under it, may be brought forward for consideration on the coming in of the adjustment or auditor's report.

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The following decree was adopted by the Court and entered in the cause :

This case having been heard upon the pleadings and proofs, and having been argued by Mr. Sedgwick for the libellants, and by Mr. Lord for the claimants, and due deliberation being had in the premises, it is considered by the Court that the libellants are entitled to recover against the claimants and against the proceeds of the cargo owned by them, and saved from the wreck of the ship *George*, a contributory part in general average, in the proportion the value of the cargo saved bore to the cargo on board paying freight. And it is further considered by the Court, that the libellants, for the purpose of such contribution, are entitled to have the ship and freight valued at the sums respectively named in the policies in the pleadings mentioned, deducting, in respect to the ship, a reasonable allowance for wear and tear on the voyage up to the time of the disaster, and all sums received on sale thereof, or any part of her tackle or apparel at the place of wreck or elsewhere. And it is further considered by the Court, that the goods of the claimants saved pay contribution according to the prices at which the same were sold at Nassau, (the place of the stranding,) deducting therefrom salvage and other necessary charges; and if it be found that such prices are below the average invoice prices of such goods, or the valuation thereof in the policies of insurance, that then the residue of the cargo paying freight be valued, for the purpose of adjusting the average contribution, at the same rate or proportion. And it is ordered by the Court, that it be referred to the clerk, (or to an auditor to be named or designated by consent of the proctors of the respective par-

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ties,) to adjust and state the average contribution against the claimants, conformably to the principles of this decree, and that on such reference, the testimony used in this cause, and such other evidence as may be pertinent and competent, may be offered by either party, subject to all legal objections.

THE STEAM FERRY BOAT RELIEF.

In an action for a collision between two steam vessels, the prosecuting vessel must prove she used all proper precautions and measures to prevent it.

She cannot sustain the action merely by convicting the other steamer of negligence or fault in her movements, which conduced to the collision.

A steamer coming upon, or crossing the track of ferry boats, plying upon the East River, between New-York and Brooklyn, is bound to special watchfulness not to interfere with their course, or impede their passages.

Long experience has demonstrated the importance to the protection of vessels navigating up and down the East River to hold to the centre of it, as nearly as may be, and it is culpable conduct to move a steam-tug from place to place, by running her along near the ends of the piers.

The master of the tug is bound to put her out into the stream, so as to disclose clearly her position and direction.

This was a cause of collision between two steamboats. The libel charges that the tug-boat Jacob Bell, on the 26th of April, 1844, left her moorings at Pier No. 20, East River, between 8 and 9 A. M., to proceed to Pier No. 23, East River, alongside the ship Cambridge, a distance of about six hundred feet; that she had passed the ferry slip at Fulton-street, and had lapped twenty-five feet on the ship Cambridge; that the steamer Relief, plying as a ferry boat between Brooklyn and New-York, was coming rapidly across the river from

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Brooklyn ; the Jacob Bell being out of her track, the Relief, through negligence and carelessness, was run against the Jacob Bell, inflicting serious injuries to her damage of more than \$300.

The answer interposed by the President of the New-York and Brooklyn Union Ferry Company alleges, that the Relief was at the time proceeding on the usual and proper course across the river, to the New-York side, in her employ as a ferry boat, the tide being ebb ; that the Relief being about 300 yards from the ferry slip where she was to land, and the tug at the time moving up, a considerable distance west of the west pier of that slip, instead of steering out into the river, and passing astern of the Relief, or stopping below or at the pier, so as to allow the Relief to pass on into the ferry slip, as she ought to have done, ran directly ahead, attempting to pass between the bow of the Relief and the east pier of the slip ; that the wheels of the Relief were thereupon immediately reversed, and every effort made to avoid coming into collision with the Jacob Bell ; but that the Bell, continuing her course directly ahead, and the ebb tide drifting the Relief down the river, the Bell came in collision with her, (still backing water,) when the bows of the Bell were opposite to the east pier of the said ferry slip ; that the collision might have been avoided by timely or proper exertion on board the Bell, and was wholly occasioned by negligence, ignorance or misconduct in navigating her ; that the Relief was a staunch, heavily-timbered boat, and was injured by the collision, costing \$45 to repair her, besides loss of time, &c.

The facts are sufficiently stated in the opinion of the Court.

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Mr. Philip Hamilton, for the libellants.

Mr. Rockwell, for the claimants.

BERRA, J.—The argument in this cause has been mainly limited to a critical examination of the clashing opinions of witnesses, and the variant version of the facts stated by them. Upon a careful consideration of the voluminous and contradictory evidence produced by the parties, I find the preponderance of proofs establishes these particulars.

That the Relief was on her route from one ferry slip to the opposite one, and one-third or one-half the distance across the river when the Jacob Bell was put in motion, from her berth, at Pier No. 20, on the New-York side of the river; the tide was ebb.

The Bell put off from her berth into the river sufficiently to clear the docks, and then run directly up towards Pier No. 23, with a light steam and slow motion. By the ordinances governing the New-York ferries and ferry slips, it is declared the duty of all vessels to avoid incommoding or obstructing the ferry boats making their passages, and such is the known usage in navigating vessels on or across the line of the ferry.

The pilot of the Jacob Bell, on this occasion, did not observe the Relief until the boats were so near each other as to threaten an immediate collision, and then called out to the Relief to back her engine and keep out of the way.

In point of fact, the engine of the Relief had been reversed and was working back before such call was made; the estimate of the distance of the two boats apart at that time rests only on hasty conjecture, and

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cannot be relied upon as determining it as one hundred or three hundred yards; but the effect of the back action of the engine of the Relief affords reason to suppose that if a like direction had been given the engine of the Bell at the same time, the collision, if not avoided, would have been so light as to occasion little or no damage.

When the engine of the Relief was reversed, the Bell had not passed the west pier of the ferry slip No. 21, and without checking her engine, continued directly ahead. When the boats struck, the Relief had no headway from her engine, and was carried downwards by the drift of the tide. The place of collision was opposite the east pier of the ferry slip, which is Pier No. 22, the next pier westward from the ship Cambridge, which lay at Pier No. 23.

All reasonable and practicable efforts were made on the Relief to avoid the collision when it was discovered that the tug was going under her bows, and would cut her off the entrance to her slip, between Piers 21 and 22. This summary of the facts shows that proper precaution was not used on board the Bell in navigating her on the occasion, and that the collision occurred by means of her fault or inattention. This conclusion of fact is sufficient reason for the rejection of the libellants' action, as upon the undisputed doctrines of the laws of navigation, the prosecuting vessel must prove herself clear of fault, and also establish culpable neglect or actual misfeasance against the other, in order to maintain a suit for injuries by collision. So, also, if there were fault or want of care on both sides, or no fault on either side, the action must fail. (3 *Kent*, 293.) Judge Story remarks, that in all cases of collision the

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essential question is, whether proper measures of precaution are taken by the vessel which has unfortunately run down the other. (*Story on Bailments*, §§ 6, 11.)

These elementary principles of the law bar the right of action in this case, and it would not be requisite to *motive* the decision with any particularity, except to give prominence to a feature in this case, which is of higher general importance than the special merits of this action or defence.

The case brings to view the rights of ferry boats to an undisturbed passage between their landing places, in the performance of their duties in that capacity, as a species of privilege or immunity not accorded to other vessels. It is strenuously denied, on the part of the libellants, that ferry boats have any privileges of navigation not common to all other vessels. The facts in this case do not present that specific point for adjudication, but it calls upon the Court to notice that the steam-tug was put off from her berth and pursuing her business on this occasion, directly adjacent to the line or track run by the ferry boats, and that their transits at that ferry are, with but a very few minutes interval of time, in constant continuance during the day.

Whilst the rapidity of the currents in the East River, the numerous craft of all classes passing its waters, and the safety and lives of great numbers of persons conveyed in the ferry boats on every trip, exact the utmost vigilance and circumspection in the navigation, the same considerations require, in reason and law, that other vessels approaching the track of these boats, under such notorious warning of the probability of their being also upon or near it, should be conducted with extreme watchfulness and precaution, so as not to

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impede the regular running of the ferry boats, or endanger the passengers conveyed in them; and the city government, which possesses full power over the subject by its ordinances, interdicts all obstructions to the free course of ferry boats. Long experience has demonstrated the importance to the protection of vessels navigating the East River in that vicinity, to require steam vessels to keep as near as possible to the centre of the stream in passing up and down it, and the general usage conforms, in a great degree, to that necessity. A special law may still be demanded to give full effect to this requirement.

The custom and usage, although serviceable in keeping moving vessels away from shipping moored along the piers and near the shore, and also in unmasking them from the cover of the docks and vessels in or adjacent to the slips, has yet a more beneficial application to the navigation of ferry boats from the New-York and Brooklyn shores, on the numerous ferries between those cities, it being indispensable that the exit from and entrance into the ferry slips should not be checked or embarrassed by the presence of other vessels passing close to them.

In this instance, had the master of the tug exercised the watchfulness his position and action demanded, he could not have failed to discover his exposure to collision with the approaching ferry boat, and might easily have used the means of avoiding it; or if, instead of hugging the wharves in his evolution, he had gone out openly into the stream, he would have afforded the ferry boat opportunity to escape, or lessen the danger of a meeting on her track.

I think the evidence shows the collision was occa-

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sioned by the culpable inattention of those managing the *Jacob Bell*, and that accordingly the libel must be dismissed, with costs.

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A ship is not answerable for damages to a perishable cargo occasioned by an unusually protracted voyage, unless the delay is owing to the fault of the master or owner.

That a voyage between particular ports is usually performed within a specified period of time, is not a circumstance which of itself imports culpable negligence, or want of skill, or competency in the crew of a vessel which occupies double that time in making it.

The fact that a cargo of raw hides, shipped in good order on the west coast of Africa the 2d of October, and transported to New-York in the hold of the vessel, unexposed to the atmosphere, arrived there the 18th of January following, injured by heat and worms, is competent evidence to prove the damage was caused by the long continuance of the voyage.

It is a breach of the warranty of seaworthiness for a vessel to leave her port of lading abroad, or any intermediate return port, with a crew inadequate to man or sail her.

The act is not justified if it be exceedingly difficult or even impossible to procure competent hands to man her. The obligation to supply a sufficient crew is absolute on the owner and master, and continues during the voyage.

An unusual procrastination of a voyage is not, in itself, evidence of incompetency in the crew to navigate the vessel, but it is admissible in corroboration of the opinion and judgment of witnesses that the crew was insufficient for the service.

The testimony of a crew to their own good health and bodily ability when they left port, is adequately rebutted by proof that they had been in the hospital sick with a malignant fever, and shortly after rejoining the ship had a relapse at sea, and became totally disabled to sail the vessel.

A cargo of raw hides is liable to speedy deterioration from worms and the confined heat of the vessel in a hot climate, but can be essentially protected from such injuries by being beaten or ventilated.

When a vessel so laden put into Cape de Verd Islands because of unseaworthiness, and was there detained thirty days for that cause, it was culpable negligence in the master not to use, during such detention, proper means for the preservation of her cargo.

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When parties fix no time for the delivery of a cargo, the Court will not adopt any supposed one as the proper time, nor, if the value of the cargo is found greater at such period than at that of its actual delivery, award the difference as damages to the shippers.

Quere! Whether an action *in rem* will lie by shippers against a vessel to recover back an overpayment of freight made by them to the master.

John Anthon and *W. Emerson*, for libellants.

D. Lord, Jr., for claimant.

THIS was an action *in rem* to recover damages for breach of a charter-party given in this port May 13, 1842, for one-half the vessel.

The voyage agreed upon was "from the port of New-York to one or more ports on the west coast of Africa, and back to New-York direct, or *via* the Cape de Verd Islands."

The vessel was to take out and bring back cargo, and be paid \$400 per month for the voyage. The charter-party contained the usual stipulations that the owners should man and find the vessel, keep her in repair, &c.

It is unnecessary, in considering the points in dispute in the cause, to detail minutely the course and incidents of the voyage. A succinct summary of facts will bring out all that is material to be stated. The libel makes numerous allegations, and the parties on both sides went into a wide range of proofs, neither of which are important to an understanding of the questions decided by the Court.

The vessel sailed from this port under this charter, June 13, 1842, with cargo belonging to the libellants on board, to be sold from the vessel. She touched at ports in the Cape de Verd Islands, where she disposed

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of part of her cargo. The remainder of it was sold on the coast of Africa, and she reached Gambia about the first week in September, ready to receive the home cargo. There was laden on board her, at that port, over 60,000 lbs. of hides, consigned to the libellants; and she made sail for this port with the cargo, October 2, 1842. She put into Buena Vista, in the Cape de Verd Islands, on the 13th of October, on account of sickness of the crew, and their insufficiency to navigate the vessel, and for no other necessity of the ship or voyage. She remained there, for the same reason, until November 18th, when she left for New-York, but stopped the 19th at St. Jago, to obtain more hands, where one hand was procured from a Portuguese vessel; and the consul put on board her three to be taken home. So manned, she departed again for New-York, and arrived off this port January 4th, but was blown off by stress of weather, obtained a pilot, and put into Newport for shelter, and did not get into New-York until January 18th.

The hides shipped at Gambia were greatly deteriorated by long confinement on board in a close hold, and by worms and otherwise.

It appears, from the evidence, that a few days after the arrival of the vessel at Gambia, the crew were taken sick with the coast fever, and between the 15th and 24th of the month, all the men and both mates were removed from the vessel to the hospital. They left the hospital, and returned on board the 27th, 28th and 29th of September. They were very importunate to get back to the vessel, and were permitted to return against the opinion and advice of the physician. They were exceedingly reduced and enfeebled by the effects of the fever and confinement. There is testimony that

the physician was of opinion they would experience a relapse of the disease if they attempted to work the ship. In the judgment of other witnesses, they were wholly unfit for the service. But the men themselves testify they were able to do duty, and it was also in evidence that the physician said the men had better go on board, and leave the coast, and that by proper care of themselves they might be in a better condition than to continue at Gambia. The cargo was put on board by natives of the coast, the crew being in the hospital, and disabled by sickness from assisting. One or two of the men experienced a return of the fever soon after leaving the coast, and all the crew were again attacked with it at sea, and became so exhausted and feeble that they were incapable of continuing the voyage. The master being taken sick, also, the vessel put into Buena Vista, because of the unfitness of the crew for service, and for that cause alone.

It was proved that raw hides shipped from the coast usually begin to suffer injury from worms and close stowage in thirty days after laden on board; but if opportunity is afforded for doing it, they may be, in a good measure, preserved from serious damage, by opening the hold, and exposing them to the atmosphere, or by beating them. It was in evidence that the master opened the hold in Buena Vista, and became aware of the perishing condition of the hides. It was also proved that forty days was a customary and reasonable period for a voyage from the west coast of Africa to this port, at that season of the year, and in vessels of that class.

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ages in this action, substantially, upon two grounds: First, the procrastination of the voyage, by which the arrival of the vessel at her port of destination was retarded to the season notoriously sickly upon the coast, and beyond the proper period for shipping hides for this market, thereby exposing the crew and cargo to perils they would not have incurred had the run out been made within a reasonable time, and also delaying the arrival of the cargo in this port until the market for its sale had gone by; and secondly, the taking of the cargo on board at Gambia, and leaving port with the vessel not in a seaworthy condition.

In my opinion the first proposition does not, in the whole or any of its parts, rest upon a legal basis. It must be merely matter of hypothesis and conjecture whether the prolongation of a voyage is owing to the want of seamanship, diligence or judicious conduct in the officers or crew. So many natural causes control the event of voyages, that no law giving them proper directions can be deduced from experience, analogy or the intrinsic character of the employment. To render shipmasters or owners responsible for a matter in its nature so fortuitous, there must be connected with it some culpable act of omission or commission on their part. There has been no evidence produced in this case showing negligence or misconduct in the fitment or management of the vessel on her outward voyage, and it must, therefore, be regarded matter of chance whether the run was made in forty, or occupied seventy days, and was terminated at a healthy period best adapted to the business of the vessel, or extended to the known sickly season of the coast, and one most unfavorable to the objects of the voyage. The same ob-

servations apply to the passage of sixty days. from Buena Vista to the port of discharge, with the consideration in favor of the last, that two men were lost at sea after leaving St. Jago. It is a common incident of navigation that vessels commencing voyages under circumstances equally favorable, in equipment and capacities of crew and vessels, at the same time vary in their despatch in proportion as large as the difference between forty days and the period of the outward or homeward run on this voyage; and in respect to the outward voyage in this case, there is no evidence of unusual delay with the vessel after reaching the Cape de Verd Islands, as she was then occupied in selling the cargo there and along the coast.

It appears to me that the libellants have established the responsibility of the ship for damages upon the other ground of complaint, both for the want of seaworthiness in the vessel, and culpable negligence of the master in keeping the cargo of hides confined below deck, whilst the vessel was lying at Buena Vista, from the 13th of October to the 18th of November, without ventilating or beating them, or using any precautions for preserving them from the perils of the climate, and those to which they were specially liable in their then condition.

The owner was bound to keep his vessel seaworthy during the voyage, and it is a cardinal requisite to the fulfilment of the obligation, that she shall be furnished with an adequate number of persons of competent skill and ability to navigate her. (*Abbott, ed.* 1829, 222; 3 *Kent*, 203-5; *Ib.* 287; *Silva v. Low*, 1 *Johns. Cases*, 184; *W. Lanahan v. The U. Ins. Co.*, 1 *Peters*, 183; *Taylor v. Lowell*, 3 *Mass.* 331; *Merchants' Ins. Co. v. Clapp*, 11 *Pick.* 56.)

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This responsibility does not apply to casualties occurring from sickness or accidents at sea which disable the crew; but it includes the condition of the ship when she leaves a foreign port, and especially her port of lading and departure with a home cargo, equally with that with which she enters upon the voyage. (*Putnam v. Hood*, 3 *Mass.* 481; *Kimball v. Tucker*, 10 *Mass.* 192.) The obligation is not discharged because it is found difficult or even impossible to procure a competent crew at the place. The ship assumes that risk abroad as well as at home. She would accordingly be chargeable to the same extent with a violation of her warranty, by sailing insufficiently manned homeward from a foreign port, as in entering upon a voyage at her home port, unseaworthy in that respect.

The evidence seems to me to leave no room for question that the vessel sailed from Gambia with a crew wholly inadequate to her safe navigation. The testimony of the men themselves, who manifest the most marked solicitude to prove their own good health and competency, leaves little room to doubt that they were at the time scarcely more than convalescing from the dangerous illness which they had endured, and were disqualified for undertaking the charge of the vessel at sea; and I consider it credibly proved, that the physician there gave the master to understand that as his opinion. The opinion of other witnesses that the crew were incompetent to man and sail the ship is corroborated by the immediate result of their undertaking to do it. Some of the men were taken down again with the fever four days after leaving Gambia River, and the whole crew went into Buena Vista, after being out thirteen days, sick and enfeebled to such a degree as to be

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unable to continue the voyage. The run from Gambia to the Cape de Verd Islands, with a crew sufficient to man and work her, would, it appears, ordinarily be made in three days. The ship was thirteen days in performing it, and although that fact, as before suggested, is not sufficient to charge the owners with damages alleged to be consequential to the delay and prolongation of the voyage, still it is a circumstance conducing to support the evidence to the incompetency of the crew to work the vessel at the time she sailed from Gambia.

The ship having come into the Cape de Verd Islands from necessity, because of her unseaworthiness, the burden of proof is cast upon the owner to show that deficiency was removed when she departed, in continuation of her home voyage. In my opinion that fact is not satisfactorily established. It is quite evident, upon the proofs, that the whole thirty-three or thirty-four days detention at Buena Vista was required to restore the crew to a state fitting them to enter upon the voyage again, and that then they were inadequate to navigate the vessel alone. She stopped the next day at St. Jago to procure more hands, and the evidence no way clearly shows that the three consul's men, as they are called, obtained there, supplied the ship a competent crew for the voyage. Two months were consumed in getting her into this port, and six weeks in bringing her to the mouth of the harbor. But this additional retardation of the voyage is of less force as evidence of the insufficiency of the crew, because, in the course of it, two men were accidentally lost at sea; and the owner is not responsible for consequential damages arising from that event. In view of all the facts in evidence, however, I

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am of opinion that they establish a breach of the obligation of the owner to keep the ship seaworthy on her voyage. But I am not prepared to say he is, for that cause alone, chargeable with all the injuries sustained by the cargo. But I think the testimony fixes culpable negligence on the master in not taking proper measures at Buena Vista in ventilating the cargo at least, if not also having the hides beaten, to prevent the injurious action of the worms upon them. He was bound by law to take all possible care of the cargo during the course of the voyage, (3 *Kent*, 213; *Curtis' Merchant Seamen*, 216; *Abbott, ed.* 1829, 132; *Ib.* 90,) and knowing his cargo was of a perishable nature, and had begun to deteriorate, it was incumbent on him to take proper precautions for its preservation, during the delay of the vessel at that port, especially as her detention was owing to his fault in failing to furnish her an adequate crew. It was suggested, on the argument, that the libel claimed no special damages because of a breach of the duty of the master in this respect. I do not remember that any exception was taken to the admission of evidence on that subject, and if it was, I am inclined to think the allegations of the libel are broad enough to comprehend all acts of non-feasance or misfeasance on the part of the master or owner in conducting the voyage, which tended directly to produce the injuries complained of.

A portion of the hides received were damaged. That damage is at the risk of the shippers or underwriters, and is not to be regarded in this action. There is a difficulty in discriminating that damage clearly from the injuries caused by worms. But, in my judgment, the fair effect of the proofs is, that at least 25

per cent. of the loss is ascribable to the latter cause. I shall, accordingly, fix that as the rate of allowance to the libellants, and order a reference to ascertain the value upon which it is to be computed, disconnecting this injury from that by sea-damage.

The claim for compensation, because of the depressed state of the market when the hides were delivered, compared with its condition when it is supposed they ought to have arrived, rests upon inquiries and dates too speculative and vague to be made safely a ground for adjudging damages. No time was stipulated between the parties for the delivery of the cargo; and the period at which the market price is to be determined must, therefore, be fixed upon mere hypothesis and conjecture. A variation of a week or even a day as to the period to be the criterion of market value, might make most essential difference in the result. That demand is accordingly rejected.

The libellants also claim a repayment of freight money alleged to have been overpaid to the vessel. This demand is not made a point of contestation in the pleadings, and it is at least doubtful whether, if clearly proved, such payment could be a lien upon the vessel, or that any remedy could be afforded the libellants in this action. I shall, therefore, reject that claim.

A decree will be entered for the libellants, and a reference be made to the clerk to compute the amount, upon the principles of this decision.

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THE BARK JOSEPH CUNARD.

Compressing cotton in a cotton press is a mere shore business, for the purpose of arranging the bulk for more convenient carriage and stowage. The expense of the work is no lien on the ship upon which the cotton is to be freighted, and an action *in rem* cannot be maintained therefor.

Neither costs of advertising a vessel for sea, portage, nor commissions for procuring freight, wages of stevedores or lightermen, are liens on the ship, suable *in rem*. A special agent of the charterer of a ship cannot charge expenses, advances or liabilities incurred for the ship by him, in that capacity, against the owners or the ship, on any implied obligation of the owners to him.

Where the master of a ship drew a bill of exchange upon the owners, in favor of the agent of the charterer, for disbursements and expenses, the drawee having notice that the master was instructed by the owners not to draw such bills, and the drawee afterwards negotiated the bill to the libellants, held, that on the facts the debt for which the bill was drawn was no lien upon the ship, and that the holders could not maintain an action *in rem* upon it, or stand in a better situation than their endorser.

The master of a vessel cannot bind his owners for repairs or supplies to her when some other person is authorized to manage the business of the ship in that respect, and that fact is known to the creditor.

THIS was a proceeding *in rem* to recover the amount of a bill of exchange drawn at Mobile, by the master, at 30 days sight, in favor of Davies, on the charterer of the bark; at Liverpool, for the amount of disbursements for the supplies and lading of the vessel, in Mobile. The bills of lading and the freight were assigned to the libellants as collateral security for the draft, by Davies.

The vessel is owned by Irvine & Smith, of Liverpool, England, and was chartered by them to Charles Challinor, of the same place, for a voyage from London to Mobile. After the bill was drawn, and before its maturity, it was endorsed by Davies, and delivered to the libellants; and he, at the same time, assigned to them

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any lien or privilege which he might have upon the vessel, for a debt claimed to be owing him for advances for her use in Mobile.

The answer denies that the libellants are entitled to the relief sought in this Court. It alleges that the owners appointed Messrs. Pope & Son, of Mobile, consignees of the ship, and agents of the owners, to make all necessary disbursements on account of the ship for them. That the master was specially instructed, as was known by the charterer and Davies, not to draw bills on the owners for repairs, supplies or services for the ship. It avers that the charterer was to load the vessel at Mobile, reserving freight, according to the charter-party, to the owners; and that he appointed Davies his agent at Mobile, for that purpose, and notified the owners and master thereof.

That if any advances were made by Davies, they were for the benefit of the charterer, and under his instructions, and not for the ship or owners, nor by their authority.

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BERRS, J.—The proofs produced, consisting principally of the charter-party, the letter of instructions to the master, the correspondence and account stated between Davies and Challinor, the depositions of the master and of Davies himself, establish, in substance, this case.

That the vessel sailed from London March 1, 1843, under a charter to Challinor, engaging she should arrive at Mobile by the 10th of May, and there be loaded with cotton at the charge and expense of the charterer, but in other respects she was to be under the charge and directions of the owners. She was consigned to

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John H. Davies, at Mobile. The master was specially instructed not to draw bills on the owners for expenses or disbursements of the ship, but was referred to their agents, Messrs. Pope & Son, at Mobile, for supplies and advances, if necessary.

Davies was the agent of the charterer, and saw the charter-party before he made any advances to the master for the vessel, and also the letter of instructions to the master before the bill of exchange was drawn, and the bill was drawn by the master on the owners at the urgent instance of Davies.

It is further shown, that the disbursements made by Davies were chiefly for pressing the cotton, and transporting it by lighters from the shore to the vessel, and charges connected with his agency for the charterer in obtaining and shipping the cargo, there being out of the amount of the bill, (£590, with exchange,) only the sum of about \$661 16, which would seem to have any direct application to the necessities or service of the vessel, with the exception of a questionable charge of \$87 64 in jail fees, board, &c., advanced in favor of sailors, and including \$15 for medical attendance for one of them on shore.

I can perceive no foundation under the special appointment of Davies as agent or broker for the charterer in procuring a cargo, and placing it on board, upon which he can raise a claim against the ship or owners for those services, although he may have acted with the concurrence of the master; and even if the owners could be made personally liable for the charges, several of them are not of a nature to admit their being imposed *in invitum* on the ship, and enforced *in rem* by an Admiralty Court.

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The account charges \$1,027 50 for compressing the cotton. This is mere shore business, performed in cotton presses on land, at the port or in the interior, as may be desired by the purchaser, and would probably be alike useful and important whether the transportation is to be on land or on shipboard, the only object being to fit it for more convenient carriage and stowage.

Charges for advertising and posting, (\$10,) and commissions on procuring freights (\$338 80) on the employment of the charterer, and not that of the owner or master, cannot be regarded demands or services attaching as liens to the vessel.

It may be inferable from the facts, that the freight was expected to be made by purchasing and shipping cotton for the charterer, but there is no higher reason for charging the vessel with *commissions* on such operation, than upon the purchase price of the cargo itself. Nor would the privilege be varied, if the shipment was solicited or procured by the agent from a third party for consignment to the owner. The service of the agent would be simply a mercantile one rendered on land, and bearing none of the qualities necessary to bring it under the securityship of the vessel. Furthermore, in this case, Davies was employed by the charterer, and had direct notice that the owners had their own agent at the port to respond for the ship.

The charge of \$457 60, for stevedores' work, is only for labor at the wharf or moorings of the vessel, in stowing cargo, and is not distinguishable in character from charges of draymen or lightermen, who bring the cargo to the ship to be laden on board.

It has been decided in this Court, that stevedores

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cannot proceed by libel against a vessel for their services in loading or unloading her. (*The Amstel*, 1 *Blatch. & How.* 215.) And the charge of \$481 17, for lighterage, would seem in principle to stand on the same footing. It is an employment outside of the vessel, not contributing to her capabilities or security in navigation or serviceable to her voyage; there is no difference of principle, whether the cargo is brought to her side in the stream or placed near her on a wharf.

The ship is responsible for disbursements necessary to equip and put her in a condition (by men, provisions, &c.) to perform her voyage, but it would be giving a novel extension to the notion and range of tacit liens to subject her also to all claims collateral and incidental to her despatch. A cargo is no more than an incident to a voyage, and in no sense necessary to enable the ship to perform one. Debts arising out of such collateral services or engagements may be chargeable upon the owner personally, as resting upon his implied contracts; but the ship is not necessarily pledged to their satisfaction more than for wages of the master, or other benefits to the mercantile adventure of the owner.

In the same category the charge of \$70 for commissions, and \$41 for insurance on the master's draft, should be placed. There is no reason or equity for the latter charge against the owners. Their letter of instructions to the master, shown to Davies, forbid the master drawing on them for necessities of the vessel, and referred him to an adequate resource supplied by them for that purpose, in the port where the expenses were to be incurred.

I am of opinion, therefore, that not over \$763 80 of the amount claimed could be charged against the ship,

had Davies been acting under direction of the master, or as agent of the owners; but under the facts in proof, he must be regarded the particular agent of the charterer, making advances on his credit, and relying on his personal responsibility. This responsibility Davies had strengthened by obtaining an assignment of the bill of lading, freights, &c., as collateral security. If these resources have failed him, there is nothing in the legal relation he bore to the ship or her owners, nor in the equity of his debt, which entitles him to claim that he acted as their agent, or that gave him a privilege upon the ship.

I do not enter into the question, whether taking the bill of exchange by Davies would operate as a waiver of an implied lien against the ship, because, in my opinion, no lien accrued to him out of his transactions in the case.

The libellants cannot stand in a better condition than Davies, the drawee and endorsee of the bill; and as he had no claim or lien upon the ship for his demands, he could confer none upon the holder or his assignees. He was apprised that the master was specially instructed by the owners not to draw bills for expenses, repairs, &c., upon them. He knew, also, that the ship was chartered to Challinor, for whom he was agent. In such case it is clear that the owners would not be liable to Davies for any contracts of the master with him. (*Abbott, ed.* 1829, 92; 3 *Kent*, 163.) The master cannot even bind his owners for repairs, &c., when it is known to the creditor that some other person has authority to manage the business of the vessel in this particular case. (*Phillips v. Ledley*, 1 *Wash. C. C. R.* 226.)

It is unnecessary to discuss the question, whether the

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assignment to the libellants by Davies carried with it his privilege of lien for his advances, because, as already stated in the opinion of the Court, he was not entitled to claim the security of the vessel for his demands. They can accordingly stand, in that respect, merely in his place, if they hold a full assignment of the original indebtedment to him. But it is by no means a clear proposition in law, that a bill of exchange, drawn to cover that debt, and endorsed by him to them, would operate as an assignment of the consideration for which the bill was drawn; and a full assignment of the collateral securities he held for the original claim will not, *per se*, transfer also the consideration on which the claim rested.

But the point of formality or inaptness of the title set up by the libellants, or their capacity to maintain this action, are not material points in the case. The judgment rests upon the broader ground that Davies acquired no right he could transfer to others, or exercise himself, against the vessel by action *in rem*.

The libellants could not, therefore, as holders of the bill of exchange, or assignees of Davies, set up an equity in their favor beyond their strict legal rights.

Libel dismissed, with costs.

L. Hoyt, for libellants.

F. R. Tillou, for claimant.

THE SCHOONER NAVARRO.

By the rules of Admiralty practice, pleas or exceptions must set forth the matter in dispute in perspicuous and definite terms, and it is not necessary that they should embody the formalities required in pleading at common law or in Chancery.

A cross action cannot be maintained in this Court, which seeks a re-trial of matters already adjudicated between the parties.

Nor is this rule varied when the subject matter is the same, although one action be *in rem* and the other *in personam*; the *thing* sued being regarded in Admiralty as substituted for its owner, and when subject to his responsibilities, entitled at the same time to his immunities.

O. Bushnell, for libellant.

B. Benedict, for claimants.

BERRS, J.—This is a cross action, *in rem*, on a charter-party, on which the claimants heretofore brought suit against the libellant, and had a decree in their favor in this Court.

The vessel was chartered to the libellant on a voyage from La Guyana to a plantation about twenty miles to the windward, from thence to La Guyana and Puerto Cabello, with the privilege of going to Maracaibo for a cargo.

The libel charges that the vessel proceeded only to the port of Maracaibo, at the head of the lake, and no sufficient cargo being found for her there, the master was requested to proceed up Lake Maracaibo to other ports, where cargo would be found, which he refused to do; and it avers that the usage in that trade is, for vessels chartered to Maracaibo, to go up the lake for cargo when required, without mention of such obligation in the charter.

The Schooner Navarro.

Damages are demanded against the vessel because of the non-performance of such implied contract by the master.

The claimants, by way of exception, set up the former action and the decree of the Court therein in bar of this suit, and aver that the same matters sought to be drawn in controversy in this cause have been adjudicated and decreed by this Court between the libellant and the claimants herein, and pray that the libel be dismissed.

The libellant, by an exceptive allegation, takes issue in law upon the sufficiency of the bar.

The alleged insufficiencies of the bar might, most of them, be grounds of special demurrer at law; such as that the averments are not positive, but are merely by way of recital: the want of certainty as to the identity of the subject matter of the two suits; the want of proper form and verification of the plea, &c., &c.

Others are inappropriate to this Court, as that the parties are not *nominatively* the same in the proceedings in both cases, this being *in rem*, the former *in personam*; that the issue tendered by the plea is partly *en pais* and in part to this Court, (*Betts' Adm. Pr.* 48,) and that the particulars of the former action are not alleged in the plea.

The general principle governing pleas or exceptions in Admiralty practice is, that they must set forth the matter of defence in perspicuous and definite terms, and it is in no way necessary they should embody the formalities which obtain in common law pleas, or even those used in Chancery: (2 *Browne's Civ. and Ad.* 110; *Dunlap*, 196, 197; *Betts' Admiralty Practice*, 48.)

The gist of the plea is, that the present claimants

brought their action on this charter-party against the libellant, averring full performance of its engagements on their part; that the libellant contested the action, and the Court, on the pleadings and proofs, decreed in favor of the claimants, and that the libellant now seeks to bring the same matters in controversy in this suit.

This defence is sufficient in its material point—the identity of the cause of action in this and the former suit. The substitution in this of the vessel for the owners does not constitute a distinct cause of action. The vessel being chargeable in Admiralty with the responsibilities of her owners, takes, also, all their legal privileges and exemptions in respect to the charter-party, and it is substantially sufficient, in its frame, it not being necessary to the validity of the bar that more of the former pleadings be rehearsed than is here set forth. To do so would load the files to no useful end, and the rules of Court inhibit all useless prolixities in referring to antecedent pleadings in a cause, with a view to bring a point under the consideration of the Court which may be material in a new proceeding. (*Rule 7.*)

The exception to the plea is accordingly overruled, with costs, with leave to the libellant to reply to the plea within ten days.

Ordered and adjudged that the exception filed by the libellant to the plea of the respondents of a former trial and decree upon the subject matter of the suit be overruled, with costs to be taxed, the libel of the libellant be decreed barred and be dismissed, with costs to be taxed, unless the libellant shall elect to reply to said plea; and in that case, that he have leave to file a replication thereto within ten days, on payment of the costs created by such exception, to be taxed.

The Brig Aldebaran.

THE BRIG ALDEBARAN.

Where an answer is made without oath, as authorized by Rule 87, it should still respond fully and particularly to every material averment of the libel.

Mere narrative statements in a libel, which allege no damages, and claim no particular remedy, need not be replied to specifically by answer.

Where a libel alleges a particular agreement was made, and a written instrument was executed, and the instrument embodies the substance of such agreement, an admission by the answer of the execution of the instrument is substantially an admission of the contents of the instrument.

The practice in Admiralty does not exact a course of technical proceedings.

If the answer admits to a reasonable intendment, facts stated in the libel, it will be sufficient, though loose and informal as a pleading.

J. B. Parry, for libellant.

Benedict, for claimant.

BETTS, J.—This case turns upon a point of pleading. A libel was filed *in rem*, against the brig, and *in personam* against her owner, on a charter-party. It charges breaches of the charter-party, and prays the respondent and all others in interest may be cited to appear and answer thereto, and that the brig and parties on intervening may be condemned in damages, &c., but did not demand that the answers should be made on oath.

The owner appeared, and filed his answer thereto, without oath. This he was authorized to do by the 87th rule of Court, which declares that "an answer need not be put in under oath, unless so required by a sworn libel, or one filed by the United States." (*Betts' Pr. App.* 22.) Still the answer, if not attested to on oath,

should respond particularly and fully to every material averment of the libel. (*Betts' Adm. Pr.* 53.)

The libellant takes exception to the answer for insufficiency, in two particulars; that it does not admit or deny the agreement set forth in the fourth article of the libel, that the brig should, for one hundred dollars additional compensation, proceed from Cienfuegos to Havana, and there take in cargo; nor that the one hundred dollars was paid by the agent of the libellant, and received by the agent of the respondent, within the terms and intent of the agreement.

It is not plain that this branch of the case is any way material to the libellant's right of action, the run from Cienfuegos to Havana not having been stipulated in the charter-party; and admitting a valid contract to perform that voyage as set forth, yet the libel does not specify any damages accruing out of the non-performance of that stipulation, or other cause of action accruing to him by the neglect or refusal of the respondent to fulfil that engagement. It seems rather introduced as a link in the narrative of the operations of the vessel than as a substantive gravamen in the suit against which any relief or remedy was demanded, and in that point of view the statement does not amount to an allegation which requires a specific answer.

But if the averment be regarded material and formal, I am inclined to think the answer is substantially sufficient to meet its requirements for the execution, by the respondent's agent, of the written receipt set forth in the libel, and the payment therefor of \$100, are both admitted, and the receipt embodies the agreement alleged in the libel.

This mode of answering, though informal and loose

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as a pleading, is a substantial admission of the facts stated in the libel, and sufficient, under the liberal practice of Admiralty Courts, to give the libellant every advantage he could derive from an answer more technical, and exactly adapted to the representations of the libel.

The second exception I think supererogatory. The answer to all reasonable intendment sets forth the fact demanded by the exception. It is quite immaterial that the answer should admit or deny in Court that the act charged was done "*in pursuance of the agreement.*" The agreement to do the act, and its performance, are both admitted; and if the libellant's case requires that the performance should be "*in pursuance of the agreement,*" the law will intend it was so. I think, therefore, the exceptions must both be disallowed and overruled with costs, to be taxed.

THE BRIG EMILY.

Where the rights of parties depend upon questions of nautical skill or seamanship in the management of a vessel, the Court may refer the subject to persons skilled in navigation, and act upon their report thereon.

The want of an adequate look-out on board at sea is a culpable neglect on her part, which will, *prima facie*, render her responsible for injuries received from her in that condition.

A vessel having the wind free and meeting another on the wind, must generally take the risk of avoiding the latter; and if the latter varies from her course, for any cause, she loses all claim to compensation in case of collision, and may, moreover, subject herself to damages.

So when two vessels are approaching each other in that manner, and there is danger of a collision—if the one on the wind departs from her course, but for necessary cause, she will bear the consequences of the collision which ensues.

N. F. Waring, for libellants.

F. B. Cutting, Moore & Havens, for claimants.

BETTS, J.—The libellants in this cause demand damages for losses occasioned by a collision occurring between the ship *Virginia* and the brig *Emily*, both vessels being on their way into the Hook from sea, and running against the wind. The case is a serious one in every aspect; it involves a loss of property of great magnitude, accompanied by a sudden and melancholy destruction of life, and the decision must inevitably tend to fasten blameable misconduct upon the party who fails to excuse himself from fault in this distressing catastrophe.

Independent of the customary embarrassment attending collision cases, that of gathering the essential facts out of an entanglement of conflicting testimony, the additional one is presented here, that most of the proofs, and the reasoning touching the cause of the disaster, have relation to matters purely nautical and professional, whether proper seamanship was exhibited by the pilot of the brig on the occasion, in the judgment he adopted, and in the orders he gave as to the management of the vessel; or by the crew, in executing those orders.

If, in my opinion, the rights of the parties depended upon the proper solution of these questions, I might feel it incumbent on me to invite the assistance of nautical men, in weighing and applying the proofs to these points, and to that end refer this branch of the case to competent mariners, to report their judgment upon it to the Court.

The Brig Emily.

I am constrained, however, to take a view of the subject which I am persuaded must prove less advantageous to the brig than to have had the professional skill of the pilot and good seamanship and conduct of the crew, in the particular manœuvre excepted to, adopted as the turning point in the case.

Both vessels were beating into the Hook, from sea, on the evening of the 18th of March, 1843. The wind was about N. N. W., and the Virginia was close hauled, or, in the language of the witnesses, jammed up to the wind, and running close in by the Sandy Hook shore.

The Emily had made a tack from the Romer shoal towards the west, and the pilot judging she was but a few lengths from the shore, gave the proper directions for bringing her about on the other tack. In the attempt to do this, she mis-stayed, and orders were thereupon given to wear ship.

Some slight accidents impeded bringing the sheets and sails, required to perfect this manœuvre, into their places with promptitude. The witnesses on the brig differ widely in their opinions as to her situation at the moment, and the point at which the Virginia was then discovered from her.

The mate of the brig says, the Emily was in the *act of wearing*, and had fallen off about *south* or *south by east*, but had not gained headway enough to mind her helm.

The pilot says, the Emily headed about S. W. in making the tack over from the Romer shoal, and that in wearing she never fell off more than to S. S. W., with her helm hard up, and was at no time heading east of south. She was on a direct tack to the shore then, and if she had luffed must have gone ashore. She

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might be going two or three knots at the time of collision.

Davies, at the helm, says she was making perhaps four or five knots, and was in the act of wearing; he afterwards computed her movement at six knots, and says she steered easily. Martin thought she was going five or six knots, and, as he judged from the lights on shore, ranged southerly towards the sea.

James Smith says she was going about five knots, and names the sails that were drawing full at the time.

It must, therefore, be taken as proved by the claimants, that the Emily had a sufficient steering headway on, and was bearing seaward from the Hook; the decided weight of evidence, moreover, is that she was to the *leeward* of the Virginia at the time.

A fact of great moment in this position of the two vessels is the want of a look-out on board the Emily. The Virginia was not discerned from her until an instant preceding the collision; and if a doubt might arise upon the evidence of those on board the Emily, whether the darkness of the night prevented their seeing an object ahead, the testimony from the Virginia puts the fact beyond question that a vessel might be seen a distance sufficiently great for the use of every precaution necessary to avoid it. This, I think, too, is the fair result of the evidence from those examined to this point, on board the Emily.

No satisfactory conclusion can be formed from the estimate of minutes or yards given by witnesses at such a time, and it would be most dangerous to place the decision of important and critical questions on data so equivocal.

It cannot be supposed witnesses can aver with any

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reasonable assurance that the time was two or ten minutes from the first effort to wear the ship to her collision, or that she was seen any definite distance in feet or yards, or for any certain number of minutes from the Virginia, having a supposed bearing S. of E., or that her distance from the shore was one or five hundred yards. Such computations must, in the nature of things, be essentially conjectural and at random, especially when formed in the alarm of actual collision and shipwreck.

Neither can we expect now to be assured by any reliable evidence how the Emily bore at the moment the Virginia was discovered almost in the act of collision with her, or what might have been the effect of the hurried and contradictory orders given her helmsman, under an impulse to ward off the impending shock or lessen its peril.

It would seem, however, to be demonstrated by the evidence of pilot Ludlow, with the chart before him, and in presence of the pilot of the Emily, that the latter must have greatly misconceived his bearing, his distance from the shore and speed, when the Virginia was first seen by him, or in less than the time employed to pass the questions and answers between him and the mate, and give and countermand his orders to the helmsman, his vessel must have struck the shore.

The place where the Emily anchored, and where the Virginia was found sunk, do not fix with precision the distance of the vessels from the shore at the collision, but they indicate it with more satisfactory approaches to certainty than the mere suppositions of witnesses formed under the confused and terrified state of mind and memory which must be supposed to attend the

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mischance on board the Emily, the darkness and roughness of the weather, and the consternation attending and following the striking of the two vessels together, and the foundering of the Virginia from the concussion.

From all the reliable facts in evidence, it seems to me proved, that the collision occurred a quarter or half a mile from the shore; and it results from the whole evidence that the Emily was pursuing a course bearing away from the Virginia, and then was seen suddenly coming down directly upon her whilst thrown up into the wind, and struck her in that position astern, and bearing S. W. or S. S. W.; it probably happened, that after wearing from the shore a safe distance, by some accident or mismanagement she was put about on a tack tending to the land, and in that movement ran upon the Virginia, which was lying up in the wind between her and the shore.

All the witnesses on board the Virginia assert that the Emily took the opposite direction. Her crew contradict it, but she, having no watch properly stationed on deck, is unable to meet the evidence from the Virginia with the evidence of witnesses as advantageously stationed on the Emily to observe and describe the manner in which she, being to leeward, came in contact with the Virginia, to the windward, at the time pressing out of that course so far as to luff up and leave her sails shaking in the wind.

The want of a proper watch on the Emily leaves the Court to derive the facts best known to the look-out, from the witnesses on one side alone; and becomes, furthermore, a fault of grave magnitude in itself. It is justly regarded by maritime Courts a delinquency

The Brig Emily.

in the vessel which fails to keep a competent look-out properly stationed, that renders her responsible for the consequences of collision, unless the clearest proof is made that the omission was in no way the cause of the disaster. The earlier and modern cases concur in this doctrine, and establish the maintenance of an adequate look-out as a necessary measure of precaution, the neglect of which casts the responsibility for accidents on the delinquent vessel and her owners. (*The Chester*, 3 Hagg. 326; *The Diana*, 1 Wm. Rob. 131.)

So, also, the rule of law is explicit, that a vessel running with the wind free, must take the risk of avoiding another sailing on a wind, when the two meet on opposite courses, if the free vessel has the opportunity and means, if properly used, of so doing. Indeed, the usage for the vessel on the wind to hold her course and for the one sailing free to give way in such case, has become a rule of law, which imposes the damage and losses occasioned by its non-observance, upon the vessel which disobeys the rule, unless it be clearly proved that her misconduct in no way contributed to the injury. (*Story on Bailments*, § 611; 3 Kent, 184; 2 Dods. 83; *The Thames*, 5 Rob. 308; *The Celt*, 3 Hagg. 321; *The Chester*, *Ib.* 316; *The Diana*, 1 Wm. Rob. 131; *The Harriett*, *Ib.* 182.) In the present case, the change of the Virginia's course was not toward the Emily, and with a view to pass to leeward of her, but in the opposite direction, and more out of her path, and the one she, to that moment, had been supposed pursuing.

I find in this case the preponderance of proof is against the defence set up by the Emily; it shows she was not in the act of wearing when the collision took

The Brig Emily.

place, but had come round so that her sails were filled, and she was bearing away before the wind; it shows that no sufficient and proper look-out was kept on her deck at the time, and it further shows that the Virginia was on the wind, keeping a prudent look-out, and making all proper efforts to avoid the collision.

The intermission for the moment of that precautionary vigilance on board the Emily, might very naturally spring out of a confusion likely to arise from the failure of the vessel to come round on the wind, the dangerous proximity to the shore, the entanglement of some of the running rigging which impeded her manœuvre, and the distraction these circumstances were calculated to produce in the attention of the mate, who at the moment appears to have been the only one acting as look-out forward. But they do not relieve the vessel from the obligation to maintain these precautions, or from the consequences of her omission to do so; nor from the obligation in her then position before the wind, of taking and preserving a course which should carry her clear of the Virginia.

This cause having been heard, and it appearing to the Court that the collision in the pleadings mentioned, and the damages and costs incurred by the libellants in consequence thereof, occurred by the negligence and fault of the said Brig Emily, it is considered that the libellants are entitled to recover the damages by them sustained thereby; wherefore it is ordered that it be referred to the clerk, to ascertain and report to the Court the value of the said schooner Virginia, her tackle, apparel and furniture, at the time; her cargo then on board her, belonging to the libellants, and the amount of the loss in the pre-

The Ship Martha.

mises sustained by the libellants by means of such collision, and that, on the coming in and confirmation of such report, a decree be entered therefor, in behalf of the libellants, and for their costs to be taxed.

THE SHIP MARTHA.

Where goods are shipped in good order, and are damaged on the voyage, it devolves on the owner of the ship to show that the damage was caused by fault of the freighter, or by *vis major*.

Libellant shipped 340 bundles of sheet iron on freight from Liverpool to New-York, receiving a bill of lading that the same was received in good order, and to be delivered in like good order, the perils of the sea excepted; when unladen it was found to be stained and rusted by wet, and injured thereby; and notwithstanding proof that the iron was well stowed, that the ship came in tight and dry, that the iron was taken on board in dry weather, and not exposed to the access of water, the vessel was answerable for the damage. The burden of proof is upon the ship to show that the damage existed when the cargo was laden on board.

The acknowledgment in the bill of lading that the cargo is received in good order, though part of the shipping contract may be explained or disproved by parol testimony.

Quere! Whether a general ship is liable for damages to cargo well stowed, caused by exhalations or dampness arising from the cargo on board, (also well stowed,) unless there be a special contract in the affreightment against such loss or injury!

THIS was an action by the consignee of a quantity of sheet iron (340 bundles) laden on board the ship *Martha*, at Liverpool, for New-York, to recover damages for injury to the iron, by wetting. The libellant offered the bill of lading, which contained the usual conditions and stipulations. He then proved that the iron, when unladen from the vessel, was very wet, and

The Ship *Martha*.

water dripped off it. He further proved the damage caused by the injury amounted to about 30 per cent.

On the part of the claimant, it was shown that the vessel came in tight and dry, and that the iron was well and securely stowed, and was not so placed as to be subject to the access of water or moisture during the voyage.

The mate testified, that when taken on board, it had externally the appearance of being in good order, and that the weather was dry at the time, and the iron was not exposed to wet in lading, or before the ship sailed. Evidence was offered to show that the condition of the iron might be ascribed to its having got wet in the hands of the carriers and lightermen, at Liverpool, before it was delivered to the ship, and an instance of the kind was stated where an attempt was made to impose articles on a ship under similar circumstances, but by watchfulness and caution the deception was detected.

Wm. M. Evarts, for the libellant.

Wm. M. Emerson, for the claimant.

BERRS, J.—The bill of lading undertakes to deliver the iron, then in good condition, in the same order here; but without applying to this contract the character of an absolute assumption or admission of the fact, it must be received as strong *prima facie* evidence that the property was in good order when received on board the ship. (*Barrett v. Rogers*, 7 *Mass. R.* 297.) The law does not give a bill of lading the character of a warranty that the property received by the ship is in absolute good order and condition. It binds the ship

The Ship *Martha*.

and owner no further than to the external appearance of the case or boxes, or of the article itself, when imported without envelope. This is especially so as between the freighter and ship-owner; (*Valin, lib. 3, tit. 2, art. 2*; 2 *Boulay Paty*, 309, 313;) and on general principle, that part of the bill of lading which operates as a receipt, is open to explanation or correction by parol evidence.

The sheets of iron, in this instance, were held together by hoops around them, but not in a way to confine a quantity of fluid, and prevent its being discovered by the mere act of moving the bundles. The injury or exposure of the bundles, by having water already deposited within them, would not thus be ever concealed from observation when they were brought to the ship, by the mode of putting them up for exportation; and the claimant is necessarily required to give strong evidence, under such circumstances, that the injury had already been sustained, or the proximate cause of it existed, when the iron was laden on board, otherwise his acknowledgment and undertaking in the bill of lading must stand in force against him.

In this case the libellant does not rely exclusively upon the admission in the bill of lading, but gives positive proof that the iron was delivered to the ship in good order. The fact that it was damaged when delivered to the consignee, fastens the responsibility for the deterioration upon the ship, unless the owner is able to show the injury arose from perils of the sea, or some inherent defects in the article, not discernible when it was received on board.

The presumption of the law, without countervailing proof on his part, is, that the injury has arisen from

The Ship *Martha*.

fault or negligence in the stowage or transportation in the ship. (*Bernadon v. Nolte et al.* 7 M. R. (Lou.) 283.)

The ship had a quantity of salt on freight, and an attempt was made to prove it stowed in the vicinity of the iron, in a situation where it might be inferred that an exhalation of dampness from the salt was the means of creating the rust or stain complained of; but the stowage of salt turned out to be in another part of the ship, nor do I think, this being a general ship, the owner would be answerable for this kind of injury received by one part of a cargo from another, if the stowage was in the usual manner, unless the contract of affreightment had stipulated the contrary. There was no evidence that the damage was caused by perils of the sea, or *vis major*, and it is not enough for the owner to raise a doubt whether the iron came to the ship in a wet condition or received the injury on board, nor to show that it is difficult to account for its condition; but it is cast upon him to prove, affirmatively, that the injury was received before its delivery to the ship, or at least to show circumstances affording a violent presumption that the rust or stain could not have been communicated on ship-board.

Without touching the question, then, whether as against the assignee of the bill of lading, or even the freighter, the ship-owner might prove a fraud practiced on him by the shipper of the goods abroad, in putting them on board in a damaged condition, I am of opinion, upon the evidence produced, that the owner has not shown that the iron came on board wet, or any other fact, discharging his responsibility under the contract in the bill of lading.

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The engagement of the bill of lading must accordingly be enforced against him, and the libellant is entitled to recover the difference between $4\frac{1}{2}$ cents per pound, for which the iron was sold in its damaged condition, and its value here, $5\frac{1}{2}$ cents; together with charges for cartage, labor and money expended in consequence of the damage, but deducting the abatement of duties allowed at the Custom-House, because of the damaged state of the iron. The case will be referred to the clerk to state the account, upon the principles of this decree.

CHARLES H. SHAW v. JONATHAN THOMPSON *et al.*

A consignee of a charterer, and dealing with him in that character, must be presumed to know the contents of the charter-party.

He cannot deal with the charterer as owner for the voyage, when by the charter-party the entire possession and control of the vessel remains with the master and owner.

If the consignee, in such case, credits the freight on the consignment to him, on debts owing him by the charterer, he will not thereby acquit himself of liability to the master therefor.

The payment to the charterer will be on the responsibility of the charterer, and not on that of the vessel or her owner.

NOTE BY THE REPORTER.—A case similar to the foregoing has been since decided in Louisiana. The action was for damages of 780 bundles of iron on board ship, by wetting. It was shown in this case, that though the weather had been rough, that the vessel was staunch and well built, and not injured by stress of weather. It was also proved by defendants, by the testimony of the stevedores who loaded the vessel, as well as by other witnesses, that the stowage was such as is customary, and such as is considered safe. But the fact of damage being positively shown, and the burthen of proof resting on the common carrier to show that it was a damage occasioned by the perils of the sea, which fact was not made to appear, the vessel was held liable for the damage. (*Prior, Frost & Co. v. Ship Ariel*, 10 *Lou. An. R.* 418.)

The master, notwithstanding any interference or direction of the charterer, has a right to retain the goods until his lien shall be satisfied, and he may sue the consignee after delivery to them of the goods, and recover the freight, at least to the amount due on the charter-party.

Where the consignee has notice that freight must be paid to the master and not to the charterer, it imposes the like obligation upon him as if so reserved in the bill of lading.

A consignee has no right to appropriate moneys due for freight to satisfy advances made by him to the charterer, although the bill of lading directs the freight to be paid to the consignee. But a direction to the consignee by the master, to pay a sum out of the freights to the charterer, will be equivalent to payment to the master.

An agreement by the master to pay a debt of the charterer to the consignee, without any consideration, is a *nudum pactum*, and void.

A receipt, alleged to be given through mistake, may be explained by parol evidence.

A libellant who demands an entire sum, when part of it has been paid according to his directions, and compels the respondent to defend, impairs his equity to costs in a Court of Admiralty.

A respondent who contests the entire demand of a libellant, when a portion of it is justly claimed, although he defeats the suit in the main matters in contestation, loses his equity to costs.

Admiralty Courts, in adjudging costs in their discretion, regard the essential merits and equities of the parties rather than the result of the litigation.

And may withhold costs from both parties when neither proposes to do what is substantially just between them without litigation.

Mr. S. B. Noble, for libellant.

Mr. G. Spring, Jr., for respondents.

THIS action was instituted *in personam* against the respondents, to recover the sum of three hundred and fifty dollars, claimed to be due for freight on a cargo shipped at St. Jago de Cuba, and consigned and delivered to them.

The respondents deny all liability or indebtedness to the libellant therefor, and aver that they have paid the whole amount of freight to the charterer of the vessel, with the assent of the libellant.

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The libellant being master and part owner of the schooner *North Star*, chartered her to Stearns, for a voyage to St. Jago de Cuba, from New-York and back, at \$300 per month, the charterer to pay domestic and foreign port charges.

The vessel performed the voyage out and returned to the port of New-York, March 7, 1845, with goods consigned to the respondents, for which \$350 freight was payable. The bill of lading contained the singular statement that the \$350 freight was "payable to Messrs. Thompson & Adams," who were the consignees, and are the respondents in this action. On the arrival of the vessel, notice was given to the respondents that the freight must be paid the master or owner, and the goods were delivered them under that notice. The charterer (Stearns) was insolvent, and it was proved he was then indebted on the charter-party more than the amount of the freight payable on that shipment.

There was due the respondents from the charterer, for advances made him upon the outward voyage, \$91 90, over the amount of freight received by them thereon; and they claimed that the return freight was to be applied in extinguishment of that balance, and refused to pay on the present bill of lading more than \$258 10, which they proffered to the master, or the charterer, whichever of them should consent to receive it.

After much altercation it was agreed that the \$258 10 should be paid to the charterer, and that the libellant would look to him for that amount of the freight.

The defendants thereupon paid the charterer \$258 10, in presence of the libellant, and with his direct assent,

and took the charterer's receipt in full on the account current between the respondents and him. The same day the charterer paid the master \$251 40, and took from him a receipt in full "for all demands to this date, (March 15,) on account of schooner North Star, chartered from the port of New-York to the port of St. Jago de Cuba, and back to New-York."

The bills of lading being retained by the libellant, he subsequently demanded of the respondents \$350, the whole return freight, and payment being refused, this action was brought for its recovery.

The libellant insisted that the \$251 40 paid him by the charterer was received in satisfaction of an outstanding demand against him on the charter-party, subsisting before the delivery of this freight to the respondents, and that the freight money now demanded was left for him to collect from the respondents; and that if his assent to the settlement between the respondents and the charterer is proved, and binds him, it can only affect him to the amount actually paid at that time, \$258 10, and that he is entitled to recover the balance, \$91 90, in the hands of the respondents.

It was also urged that the testimony showed the master was illiterate, and incompetent to comprehend the transaction, and commit himself and his owner in the arrangement between the respondents and the charterer.

BETTS, J.—Although the transaction between the respondents and charterer was so conducted as to conclude the libellant, by his assent, that the \$258 10 actually paid the charterer, should be accounted so much paid the master towards the freight, yet it is palpably

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unjust that the earnings of the vessel should be thus diverted to the satisfaction of debts due by the charterer to the respondents, for which the master or the vessel were in no way responsible. But the libellant cannot allege his own incapacity to do the business of the vessel, and he must be deemed, on the proofs, to have adopted the payment actually made in his presence, and with his consent, to Stearns, as made to himself.

The respondents must be presumed to know the terms of the charter-party, and that they could not deal with the charterer as owner of the vessel for the voyage, her entire possession and control being reserved to the master and owners, (3 *Kent*, 219, 220,) and, therefore, their advances to the charterer on the outward voyage must be regarded made on his personal responsibility, and not on any right to sequester or reserve the freights which might come into their hands on her return, for advances on the credit of the freight.

Whatever stipulations may have been made between the respondents and the charterer for the appropriation of the return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, cannot be questioned, (4 *Wash.* 110; 1 *Paine*, 358; 1 *Sumn.* 551; *The Schooner Volunteer*, 2 *Sumn.* 589; 8 *Wheat.* 39; 8 *Wheat.* 605; *Gracie et al. v. Palmer*, 3 *Kent*, 3d ed. 138, 219, 220,) and the English rule unquestionably coincides with the American to that extent. (*Abbott*, 286, 287, 288; *Smith's Mercantile Law*, 187.)

This right he might waive, as he could his lien on the goods, by express agreement with the charterer or consignees, on adequate consideration, otherwise no

arrangements between consignees and a charterer, not authorized by the charter-party, will be of avail against the right of the ship to freight.

The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raised an assumpsit against them to pay freight according to the stipulation of the bill of lading. (*Abbott*, 177, 178; 3 *Kent*, 138.) And this implied obligation becomes equivalent to a positive one, when the goods are received, as in this instance, with notice that the freight must be paid the master, and not to the charterer.

The goods for which freight is now claimed were laden on board at St. Jago de Cuba, under the charter-party, and it must accordingly be assumed that the special provisions in the bill of lading were inserted by the charterer or his agent, for his benefit.

The goods were to be delivered to the respondents or their assigns, he or they paying freight therefor, \$350 for the whole, *payable to said Messrs. Thompson & Adams*, (the respondents.)

The testimony shows that there was a balance of account due the respondents from the charterer for advances, proceeds of cargo, &c., on the outward voyage; and it was probably with intent to secure that balance that the charterer required the freight, whoever should be chargeable for it, should be placed in the hands of the respondents. This he had incontestably a right to do, provided he fulfilled his engagement in the charter-party; but the law would not permit him to regulate the collection of freights on the return of the vessel, so as to bar the master the recovery of it from the consignees, if not paid by the charterer.

The respondents understood their liabilities, for the

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evidence is full that they avowed their readiness to pay the freight to the master or charterer, as it might be agreed between the two, and set up no claim to retain the freight in their own right.

They pressed the satisfaction of the balance standing on their account current against the charterer, and declined paying over the freight till that was secured, but such appropriation was not claimed on the footing that the freight was subject to their disposition, but that it was money of the charterer in their hands, out of which they were entitled to retain the balance due them.

It is clear they had no legal right to apply the money in that manner, there being no surplus belonging to the charterer. The whole sum was insufficient to meet the demands of the owners under the terms of the charter-party, to whom it primarily belonged. (*Abbott*, 247.) So far as the libellant consented to the payment of the freight to the charterer, such payment would be equivalent to one made to himself, and will acquit the respondents from any after accountability to him for it. The respondents insist the libellant agreed they should account with the charterer for the whole freight, knowing it was to go in extinguishment of his debt to them, and explicitly sanctioned such appropriation when made, and expressed himself satisfied to look to the charterer for his pay.

The testimony of Thompson, brother of one of the respondents, who was present at the time the money was paid by them to the charterer, is relied upon as definite and conclusive upon this point.

He says his attention was called to the conversation between the parties. He heard his brother say he would pay the money to either, if the other consented

to it, and told them they must settle between themselves whom he should pay. The libellant said, "You can pay Mr. Stearns," (the charterer.) The respondent asked, "Will you both, then, be satisfied if I pay Mr. Stearns this money?" The libellant replied in the affirmative. The respondent then asked, "Will you have any claims against me?" The libellant answered, "No." The respondent further said, "You will look to Stearns for your pay;" to which the libellant assented.

The following receipt was then drawn by the respondent, subscribed by Stearns, and was in the hands of the libellant: "Recd., New-York, 15th March, 1845, from Messrs. Thompson & Adams, two hundred and fifty-eight $\frac{10}{100}$ dollars in full, for balance due me as per acct. current of 12th instant, which is hereby acknowledged as correct."

A receipt was drawn at the same time for the libellant to sign, but he declined executing it, because he said that would be giving two receipts for one payment. The witness did not notice whether the payment was in money or by a check, but thinks he observed the check-book of the respondents on the table. His brother requested him to witness the declaration of the libellant. Todd, a clerk of Stearns, proved the account current, and that the libellant had seen it. It charged Stearns \$286 78, and credited him \$544 88, including in the credit the \$350 freight.

He testified that repeated conversations were held between the libellant, Stearns and Parrington, (who obtained the charter,) about the settlement. The libellant claimed \$680 as due him on the charter-party, and he knew the respondents would not pay the freight until he and Stearns had settled together. It was agreed

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that Stearns should receive the money from the respondents, and after the \$251 $\frac{1}{10}$ was paid by Stearns to the libellant, the charter-party was cancelled by his receipt in full.

The witness testified that he understood the arrangement between the libellant and Stearns to be, that Stearns should take the money, and that the libellant should assent to it in presence of the respondents, and afterwards should sue the respondents and recover the whole \$350 from them. The witness qualified this statement afterwards by saying, he was not sure but that arrangement was made between Stearns and Parrington alone; but he accepted it as understood by all those present that such course was to be pursued.

Parrington testified that he acted only as a friend in endeavoring to bring about a settlement, and securing the master's rights; that the master was not a man of ordinary capacity for business. The witness was not present when the respondents paid the money, but was when Stearns paid libellant in part. The libellant insisted he was to have the \$350, and said he could not understand how it was he was not to get his whole freight, as that was all he was to receive for the entire voyage.

I am satisfied, from the evidence, that the master was not knowingly concerned in any wrongful arrangement with Stearns to circumvent the respondents and compel them to pay the freight-money twice, and that the true nature of the understanding was, that Stearns should receive from them all the money they would consent to pay on the account, and that the libellant would accept such payment as one made to himself.

It is undoubtedly true, that the respondents acted

upon the understanding that they were only to pay the libellant the balance in their hands beyond the account with Stearns, and that the libellant consented that the indebtedness of Stearns to them should be satisfied out of the money due for freight. The course of the negotiation, and the uniform claim of the respondents in this respect, was calculated to give that impression; but it is to be remarked, that the testimony does not show the libellant ever explicitly and in terms admitted there should be an appropriation of more of the freight moneys to that debt than the amount which he understood had been paid to Stearns. For the want of full proof of his directions or assent to such appropriation, the respondents cannot be protected in reserving the freight for payment of the debt of Stearns, owing to them. The libellant had no connection with that indebtedness, and was no way liable for it, so as to subject his property to its satisfaction, beyond what he had directly authorized to be paid to Stearns. The further objection would also exist to the respondents' claim, if they proved the most positive consent of the libellant that such appropriation of his money might be made, that it was a parol agreement to satisfy the debt of a third person, and not obligatory in law on him. (3 *Kent*, 121, 122.) The respondents part with nothing, and are no way made worse by such promise. The whole agreement imputed to the libellant unexecuted, would be without consideration and void. (*Simpson v. Patten*, 4 *Johns. R.* 422; *Jackson v. Raynee*, 12 *Ibid.* 291; 14 *Wend.* 246; 15 *Ibid.* 343.) In either case, because of defective proof, or because such agreement, if proved, would be *nudum pactum*, the libellant would be entitled to disavow it and demand

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the money actually due him, irrespective of Stearns' obligations to the respondents. The only point of view in which the case could be placed to justify the appropriation of the money on Stearns' account, would be that Stearns being charterer of the whole vessel for the voyage, on a contract to pay a fixed sum per month for her services, would be primarily entitled to her earnings, and the respondents might, therefore, rightfully contract with him to apply such earnings in satisfaction of his debt to them, and the assent of the master to such appropriation would be no more than a waiver of his right to claim freight of the defendants, and that it is competent to make such waiver by parol.

These propositions may be admitted as sound law without varying the case, because the respondents had express notice that the master would claim the freight, and were directed not to settle it with Stearns, and they do not prove a waiver, or withdrawal of that notice, further than regards the money actually paid him in presence of the master.

It is manifest, from the testimony of Doctor Thompson, that the dullness and incapacity of the libellant in matters of business, must have been well understood by the respondents. It was, therefore, incumbent on them, in order to raise an equity in their favor against his demand, because of his acquiescence or assent to their paying the freight to the credit of Stearns, in their account with him, to prove that he understood clearly the consequences they claimed from that assent, and that it was intended to divert his right to resort to them for the balance of \$350, still retained by them. The receipt subsequently given by him to Stearns, and his discharge of the charter-party, is proved to have

been without payment to him of the balance claimed against the respondents. The libellant is permitted by law to show, by parol evidence, that the receipt was given without consideration, and is not binding upon him, if that receipt and discharge of the charter-party between Stearns and the master can be made to support the defence of the respondents. (1 *Greenleaf's Ev.* 373, § 305; *Southwick v. Hadyn*, 7 *Cowen*, 334.)

It is plain, from the testimony of Parrington, that the master supposed the arrangement was to secure him the \$350 freight in cash; and the evidence of Doctor Thompson goes no further than to prove his positive consent that the respondents might pay to Stearns \$258 10 out of the sum. It seems to me, therefore, upon the whole case, that the libellant has established a right to recover from the defendants the balance of freight unpaid by them, to wit, \$91 90.

If the libellant's action and demand had been framed for the recovery of that sum alone, I should hold he was entitled to recover, in addition, the costs incurred in prosecuting and establishing his demand.

The libel, however, proceeds for the whole freight, \$350, and asserts that no part of it has been paid, and in the prayer for relief, asks that the Court pronounce in his favor for that sum. No distinction is made between the part paid by his direction to the charterer, and the part retained by the respondents, and sought to be applied to their account against Stearns, and the case throughout the trial was treated as a demand for the whole freight money. The respondents, accordingly, were compelled to protect themselves against the action, and have defeated it in the material part.

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The demand to this extent was inequitable, and the defendants ought not to be punished with costs for resisting it.

I think the respondents, also, ought not in equity to be allowed costs against the libellant. The appropriation made by them of the \$91 90 of his money cannot be sanctioned under the circumstances in proof. They are exempted from the whole costs of suit only because the libellant did not specifically demand that balance, and thus permit them to avoid contesting the action by tendering it to him or paying it in Court. But they do not entitle themselves upon the facts to costs against the libellant, because they put him to the necessity of maintaining his right to the unpaid \$91 90.

A Court of Admiralty, in exercising its discretion in the disposition of the costs of suit, will look to the substantial rights and equities between the parties, rather than to the mere result of the litigation. (*The Martha*, 1 *Blatchf. and How.* 151; 3 *Dall.* 34; 1 *Hagg.* 81; *Dunlap Pr.* 102.) And costs may properly be withheld from both parties, when neither of them offers to the other what is substantially right in the case.

Wherefore, it is ordered, adjudged and decreed, that the libellant recover in this case against the defendant the sum of ninety-one dollars and ninety cents.

It is further ordered, that neither party recover costs as against the other.

The Mutual Safety Ins. Co. v. The Cargo of the Ship George.

THE MUTUAL SAFETY INSURANCE Co. and others,
vs.
 THE CARGO OF THE SHIP GEORGE, HER FREIGHT, &c., &c.

In the adjustment and settling of general average, the contributory interest of the ship is to be estimated at her value at her port of departure, making reasonable allowance for wear and tear on the voyage, up to the time of the disaster.

General average on loss by jettison is allotted on the principle that the property pays and receives in contribution upon the basis of loss and value at the time of the sacrifice.

As between assurers and assured, the valuation agreed in the policy may be taken on general average, as the value of the property at risk.

But the valuation in the policy on the ship is no more than *prima facie* evidence of her value as against owners of the cargo; her value must be established in the ordinary modes of proofs in respect to their interests.

Invoices and bills of lading are admissible evidence of the value of the cargo at the place of shipment.

The valuation of freight in the policy may be received as *prima facie* evidence of its value in favor of and against the ship-owner, on general average.

In case of total loss of the ship voluntarily stranded for the safety of the cargo, all the property exposed to the risk must contribute, and be contributed for at its value, when the sacrifice was made.

The more ancient method of estimating freight at its gross value, both when contributed to and when contributory, held to be preferable to the modern practice of estimating its full value in the first instance, and in the second, diminishing it at discretion, by abating one-fifth, one-third or one-half from its value.

On the coming in of the report of the auditor under the reference of April Term last, (see *ante*, page 89,) various exceptions were interposed to the report by the respective parties, and applications were made to the Court to change the terms of the interlocutory decree, and to insert other provisions in the final decree. The different points and motions were argued at great length by

The Mutual Safety Ins. Co. v. The Cargo of the Ship George.

Messrs. Jno. Duer and Theo. Sedgwick, for the libellants.

Mr. Daniel Lord, Jr., for the respondents.

The hull of the vessel had been sold after the disaster on the beach for a small sum; about two-thirds of the cargo was lost, one-third only saved. The interests to be contributed for were, (1.) The value of the vessel represented by her underwriters, and valued at \$12,000; (2.) The freight represented by the underwriters on freight to the extent of the insurance, \$4,400, and by the owners of the vessel for the balance; (3.) The cargo lost.

The interests to contribute to make up this loss were, of course, as to vessel and freight, the same, and the entire cargo. The rate at which the vessel and freight should contribute was the subject of the difference of opinion. The insurers on the vessel contended on the authority of the case of *Leavenworth v. Delafield*, (1 *Caines*, 573,) and on what they asserted to be uniform custom, that to determine the wear and tear of the vessel, one-fifth should be deducted, and the vessel be contributed for upon the balance, or four-fifths. The insurers on freight contended, on the authority of the same case and custom of alleged similar generality, that the freight should only contribute on one-half its gross amount, or, in this case, \$3,400, and be contributed for on the whole, the reason of this rule being stated to be the propriety of making a deduction for the expense of earning the freight; and lastly, the underwriters, whether on vessel or freight, contended that the valuations in the policies were to govern.

In the case above cited, the following language was

held by Livingston, J., in the Supreme Court of New-York: After citing Pothier and Marshall, he proceeds, p. 579: "As the rule is not accurately defined by the law of England, and the one adduced applies to cases of jettison only, we are at liberty to make one for ourselves. The injustice of making the ship and freight contribute for their full value has already been stated. The first will be injured by the voyage, and oftentimes the whole freight received will not be equal to the disbursements and expenses to which the owner has been exposed. * * * * * What value to put on the vessel and freight, and do complete justice, is more difficult, perhaps impracticable. To take their full worth will not do. After the best reflection I have been able to bestow on the subject, I am for valuing the vessel at four-fifths of her original cost, reckoning nothing for provisions or wages paid in advance, and the freight at one-half of the gross sum agreed to be paid. This rule may be deemed arbitrary; so will any that can be devised, and yet, perhaps, it will come as near as any other in producing a contribution in proportion to the real interest of each which may be in jeopardy." For the respondents it was insisted, that this case of *Delafield v. Leavenworth* did not apply to the present; that the valuations in the policies could not affect third parties, that is, the owners of cargo; that the actual wear and tear of the vessel should be ascertained by evidence, not by any arbitrary deduction, and that the freight should contribute on its whole gross amount.

BERRIS, J.—The specific points in contestation, and determined between the parties by the decree of April

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last, were, that the Court has cognizance of the case as one of Admiralty and maritime jurisdiction, that the ship was voluntarily stranded for the benefit of the cargo, and although a total loss, her owner was entitled to compensation by way of general average; that the adjustment of average could be made in this port, where the proceeds of the cargo were attached, and that the freight was both subject to contribution, and entitled to a contributory allowance.

The frame of the order was not discussed between the parties when adopted, and the claimants, by exception to the report of the auditor, and the libellants, through a direct petition or motion to the Court, seek to have portions of the decretal order explained, modified or annulled.

To avoid the complexity of cross motions and arguments upon objections in relation to the details of the order, the Court permitted the counsel to consider the whole matter open as to the particulars to be embraced in the final decree, beyond the general principles settling the rights of the libellants to recover, and that the argument be directed to the terms asked by the libellants to be inserted in the decree adjusting the contributory interests, or fixing the rules by which they shall be determined, with the right to the claimants to propose any substantive provisions in the final order not moved by the libellants, and pertinent to the case.

The positions which the libellants maintain are, that the ship is to contribute and receive contributions upon her value agreed in the policy of insurance, deducting one-fifth for wear and tear, conformably to the rule declared by the Supreme Court of this State, in *Leavenworth v. Delafield*, (1 *Caines*, 573.)

That the cargo saved is to contribute according to its invoice value, and that lost by stranding to be contributed for at a like valuation.

That the freight is to be contributed for at its gross value, according to the amount named in the policy, being the sum payable to the ship-owner: and the freight is to contribute on such gross amount less one-half, being its cost or value at the time of loss, according to the rule in *Leavenworth v. Delafield*, (1 *Caines*, 573.) That the libellants are entitled to a decree *in personam* against Macy & Co. and Barclay & Livingston, who hold portions of the proceeds of the cargo, or part of the cargo itself, for the amount of such cargo or proceeds and costs, and to a decree against the foreign owners of the cargo, upon a proceeding by foreign attachment for the value of the cargo saved, and not recovered of Macy and the other respondents.

The claimants combat each of these propositions, except the second, and also ask the direction of the Court as to the compensation chargeable in behalf of the auditor and adjuster of average. It is understood the latter particular may be arranged between the parties, and it will not, therefore, be further noticed in this opinion.

In directing, by the former order, the ship and freight to be valued at the sums named in the policies set forth upon the pleadings, being their true values at the port and time of departure, the Court did not overlook the fact that the owners of the cargo were not parties to those policies, and would not be considered, in judgment of law, to have assented to the valuations made in them; nor was the Court unaware of the diversity of

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opinions and usages stated in the books in relation to the basis of valuations which were to be subjects of general average. (1 *Condy's Marshall*, 290-291; 2 *Ib.* 621-3.)

The preponderance of authority is believed to be, that the contributory interest of the ship should be estimated at her value at her port of departure, (3 *Kent*, 242; 2 *Serg. & Rawle*, 258; *Benecke*, 210; 1 *Caines*, 573,) with proper allowances for wear and tear; that is, upon her value at the time to which the apportionment relates. (1 *Phillips*, 358.)

Other cases indicate that if the ship is sold, her contributory value is to be the sale price. (2 *Johns. R.* 98.)

Abbott considers the rule to be that the ship is to be estimated according to her value at the end of the voyage, (*Abbott*, 356,) that is, at her port of destination. (2 *Mursh. ch.* 13, § 7, *London ed.* 1802.) But *Benecke* combats that doctrine, (*Benecke*, 310,) and his conclusions are more in consonance with the principles upon which average is exacted and given, which clearly is, that the property should pay and receive in contribution upon the basis of loss and value at the time of the disaster.

The means of measuring these particulars with certainty are not, however, well defined, and different commercial states, and sometimes different tribunals in the same country, are at variance as to the proper method of attaining that end. (*Weskett*, 255; *Marshall*, b.1, ch. 13, § 7, *ed.* 1802; 2 *Phillips*, 358; *Benecke*, 322-325; *Stevens on Av. part* 1, art. 3.)

It is, moreover, not a definitely settled principle whether these methods or means are matters of evi-

dence only, or are raised to rules of decision, and thus become fixed doctrines of law.

In the latter case it would belong to the Court to determine the amount of the contributory interests, very much as it settles the relative liability of the parties; and in the former, the inquiries would be essentially matters of fact, to be ascertained by ordinary modes of proof.

The case of *Leavenworth v. Delafield*, (1 *Caines*, 573,) is an instance in which embarrassing questions under a general average are disposed of by the judgment of the Court as purely legal, and *Gray v. Waln*, one where the same particulars were referred to the jury to be passed upon as matters of fact. (2 *Serg. & Rawle*, 229.) The Court considered the jury rightfully exercised their discretion in following the reason of the New-York case as conducing to certainty, but the decision itself is not sanctioned beyond the special case of capture; (2 *Johns. R.* 98;) and is regarded an anomaly in its principle by high authority. (2 *Phill. Ins.* 218.) No reason is assigned in the decision for giving an effect to a loss by *vis major*, different in one case from that of another; so that losses by jettison or capture can stand on different rights to compensation by average. It is to be borne in mind, that the speculations in the English books upon the valuation of the ship as a subject of general average, and essentially so, also, in the American authorities, until the case of *The Columbia Ins. Co. v. Ashby*, had relation to partial injuries by voluntary sacrifice, and not to her total loss. In the latter case no reason is discovered for distinguishing her valuation on general average from that on a claim against her underwriters.

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In respect to the valuation of the ship, as she is to contribute and be contributed for at her value at the port of departure, with a proper allowance to cover the deterioration at the time of her loss, how are these particulars to be ascertained?

As between owners and assurers, the valuation agreed in the policy is ordinarily taken for the purposes of general average, as the value of the ship; (*Stevens' Av. ch. 1, art. 2;*) and Benecke says that valuation is frequently the best guide in determining the contributory interest between all parties concerned. (*Benecke, 311-312.*)

Upon the assumption that it belongs to the Court to prescribe the means by which the value is to be determined, the policy might, perhaps, be safely adopted as a more reliable approximation to the value than the report of surveyors, or the estimate of casual observers or appraisers.

Usually the vessel is examined on the part of the underwriters by an experienced surveyor, having knowledge of her age, build and character, who will be watchful to prevent an over-valuation; and the strong interest of the owner and his agent, on the other hand, to have the policy a sufficient indemnity in case of loss, might, in the conflict of these interests and views, secure an estimate sufficiently near the fair value to answer the purpose of a general rule, which would prevent serious injustice to either party.

It is no more arbitrary to declare such valuation to be that on which the average shall be estimated, than to direct one-fifth or one-half (1 *Caines' R.* 373; *Abbott, 356*; 2 *Valin, 294-5,*) to be deducted from the proved value at the commencement of the voyage, to determine

the worth of the vessel at the time of her destruction. In view of the vagueness and want of uniformity in fixing the contributory value of property subject to general average, with which the Courts and text writers have always been embarrassed, the first order in this case adopted the valuation in the policy as the value of ship and freight, and this seems a common method of fixing such value in case of total loss. (*Stevens' Aver.* 163-167.) Yet I am not satisfied the policy can be received as more than *prima facie* evidence of the value of the ship and freight, admitting it covers no more than her naked valuation, if admissible to that extent, because the parties proceeded against in this action are not parties or privies to the policy on the ship or freight, and I do not find that the practice of taking the valuation in the policy as full evidence to that point is so far recognised in the mercantile law as to acquire the force of a general usage, and where a legal proposition is rather experimental than established, it may be considered preferable to adhere to known rules, however fit and reasonable a proposed change may appear.

Proceeding in subordination to legal rules of evidence, no less so in cases of jettison than in privation of property by other casualties, the party claiming recompense for his loss should establish its value by the ordinary modes of proofs. (*Benecke*, 294.)

The Court cannot look to the probable inconvenience or delays he may be subjected to in pursuing his remedy in that method; those are incidents to every demand put in suit, and I accordingly hold that the libellants must establish before the adjuster, by legal evidence, the value of the ship at the time the disaster

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occurred. He must determine that fact by due proof. I can see no reason to vary the rule on this inquiry, or to assume that the value at the place of departure of the vessel may easily be proved, whilst it must be impracticable to prove it at the place of her loss. Testimony, for aught that appears in this case, may as well be furnished tending to show the degree of depreciation of value, as to determine its state when the voyage commenced.

The rule is, that a *reasonable* allowance shall be made for wear and tear, (3 *Kent*, 242,) and there would manifestly be great conveniency in possessing a criterion which should infallibly fix that amount; but without the support of notorious usage and custom to an uniform scale of depreciation of a vessel by performing the whole or any portion of her voyage, it must be sheer conjecture with the Court to pronounce that the abatement of one-fifth or one-half, or any other aliquot of the value of the ship when sound, a reasonable measure of its worth at the time of loss.

The method of ascertaining the value of the ship at her place of departure, and that which governs the same inquiry, at the period of her loss, should be alike.

On the argument, the counsel on both sides agree to accept the invoice prices and bills of lading as proof of the true value of the cargo, and the policy as evidence of the value of the freight; and that agreement renders it unnecessary to inquire what effect in law those documents would be entitled to upon the question of actual value of the cargo at the time and place of its shipment, or of the freight at the time of loss.

The next consideration is, how freight is to be contributed for, and on what sum it is to contribute. In

the authorities upon which the decision on the merits in this case is rendered for the libellants, (2 *Serg. & Rawle*, 229; 3 *Wash. R.* 298; 13 *Peters' R.* 331,) it is held that freight is to be brought into the account on general average, both as receiving and rendering compensation, because of the loss of the vessel, but those cases do not settle the ratio of allowance or contribution.

In the U. S. Circuit Court the point was not debated by the bar or Court, nor does it clearly appear that any average adjustment had been made in that cause. In the Pennsylvania case the jury found the freight payable per cask, but the case does not state what rate on the value was allowed in adjustment.

The case in the Supreme Court is alike barren of facts on this point, and the attention of the Court was not directed to the consideration of the special question made in this case. It appears, by the opinion of the Court, that an auditor's report was made, but not being excepted to, no information is given of the basis upon which it was formed.

In no one of those cases, or the thoroughly studied arguments made by the counsel in them, is it intimated that the freight is to receive contribution upon one valuation, and be contributory on a different one.

The libellants, by means of the abandonment to them, stand in place of the owners in this case, and it is admitted, that on portions of the cargo, freight has been received by them, and earned *pro rata* on others, and that they are bound to contribute on what is so saved towards the general loss.

It is contended for them that they are first entitled to be allowed in contribution for the gross freight taken on board, and that they are only to contribute on the

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freight saved after deduction of the expense of earning it, whether the expenses are measured by a fixed ratio of deduction, as is the practice frequently adopted, or are ascertained by subtracting the wages and other expenditures in earning it as chargeable in favor of the ship against freight.

Legal writers, and the adjudged cases, constantly speak of the contribution in respect to freight as divisible in its character, the ship-owner to have contribution upon his gross freight on average adjustment, and to pay only upon the net amount saved him by the sacrifice to the common benefit. (*Abbott*, 356-7, and notes 1st and 2d; 1 *Phillips Ins. ch.* 15, § 11; *Benecke*, 291; *Ib.* 313; *Marshall*, b. 1, ch. 13, § 7; *Stevens*, pt. 1, arts. 2 and 4, pt. 2, art. 3; *Annesly on Ins.* 98; *Hughes*, 225-6; *Ib.* 283; *Hall*, 489, 492; 1 *Smith Merc. Law*, 192.) And such undoubtedly is the prevalent usage in respect to the contributory value of freight in cases of total loss. The principle recognised as the foundation of this doctrine is that every thing sacrificed for the common safety shall be contributed for by those benefited at its actual worth or value when lost, and that the contribution shall be drawn from every thing saved at its value at the same time. (*Maygrath v. Church*, 1 *Caines*, 216.) The Court says the freight actually gained or earned in the voyage, and not what the vessel would have earned if she had gone the full voyage, ought to be the rule of contribution.

When a jettison occurs, the freight for the voyage upon the goods thrown overboard is lost with them, and is provided for by general average at the rate of its full value.

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The freight on the residue of the cargo must accordingly be called on to contribute towards that loss at its value to the ship-owner, as one of the particulars benefited and saved by means of the jettison. What, then, in this relation to the subject, is that value as saved? There is great diversity and looseness of opinion and practice on this point, and it must be regarded yet an undetermined question of commercial law. The justness of the distinction set up between the amount to be paid and received on account of freight is not obvious, particularly as the freight lost, though paid for in full, need not be, and rarely if ever can be, fully earned at the time. The principle of the rule seemed to be aimed at is, to require the freight to be placed on the same footing with the ship and cargo, and have its interest in contribution at a common valuation, whether lost or saved.

The ship contributes upon her actual value, for loss or injury to herself or to the cargo, and in the present case is so contributed for; and it is not undeserving notice in this connection that wages and provisions, which are estimated in average adjustments as expenditures in earning freight saved and to be deducted from the valuation of freight, would perhaps be more appropriately referred to the ship, as necessities of her equipment and navigation, or of the expense of carrying her to the place of disaster. (2 *Serg. & Rawle*, 229; *Ib.* 237, notes.)

In that sense their value would be involved in the valuation of the vessel, and ought not to be reiterated and again provided for as a distinct interest in connection with freight.

But adopting the usual mode of valuation, and re-

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garding provisions and wages as expenditures in gaining freight and chargeable against that, the question yet recurs, whether the ship-owner is entitled to full freight on the cargo lost, and chargeable with less on that saved?

The case under consideration would mark the unequal operation of such rule as a general one. The owner here claims to be credited gross freight on part of the cargo, and to realize that amount in the adjustment, yet that he should be made chargeable in contribution upon the same, less the cost of earning it, say one-fifth. Thus he would be paid the expense of gaining the freight in a full allowance therefor, and receives compensation again, or what is equivalent, is relieved from contribution, in the way of deduction from the amount, before it is made contributory to the common loss.

Such method of valuation, in effect, imparts to the ship-owner a double contribution on the same loss; first, in ranking him as creditor for gross freight, then abating from the sum (which is tantamount to adding it to the ship) the cost of earning it, when it becomes contributory. It is not easy to discern the equity which permits the subtraction of the cost of wages and provisions from freight, and does not allow them on the valuation of the ship. They are the indispensable conditions to her navigation; freight is not. Whatever her value may be at the place of loss, greater or less than at the place of her departure, the services of the crew (represented in wages and provisions) become ingredients of that value, in being the means of placing her there, and would be estimated by the owner as part of her cost price at that place, as the voyage is not necessarily one earning or seeking freight. The ship is the only losing

party contributed to in this case, and, it seems to me, the suggestion is not without force, that in adjusting the average by allowing her full freight as parcel of her loss, and abstracting from the amount, when made contributory, her advantage on the average is augmented. She is relieved from contribution proportionably to the privilege thus given to freight when it is contributory.

If the rule were to be regarded as definitely settled, that between owners of the cargo, or in respect to the ship-owner, in compensation of the usual average losses on the vessel, the proportion of contribution laid upon freight shall be adjusted by deducting from the gross freight the cost of earning it; can that privilege be justly claimed, when the vessel seeks not recompense for a partial injury, merely retarding the voyage, which is performed after her reparation, and towards which she must make like contribution, but in compensation for her entire value as a total loss?

The modern practice undeniably favors that distinction, and freight is relieved from contributing on general average upon its gross value; and a lesser one, supposed to have first satisfied the expenses of earning it, is assumed as the contributory valuation. (2 *Phill. Ins. ch. 15*, § 11; *Abbott, ed.* 1829, 356; 1 *Caines R.* 573; 3 *Mason R.* 439.) Although this is accepted and acted upon by most commercial tribunals as a general doctrine, yet, as has already been shown, there is no uniformity in the rules governing the estimates of value. Sometimes it is an arbitrary abatement of one-fifth, one-third or one-half, and at others the proportion is worked out by valuing the charges incurred in gaining the freight.

Without intending presumptuously to originate a plan of contribution in this respect, or to overlook or underrate the prevailing practice, or the considerations upon which it is supported, I am more disposed to fall back upon the primitive usage, the great stock from which these diversities are offshoots. The decision now adopted will at least afford the opportunity to parties concerned in the question, to carry the subject before the national Court of last resort, where a rule may be established and declared which will govern the American merchant navigation on this important topic.

In the *Consolato de Mare*, Bourdier's translation, ch. 96, (2 *Pardessus us et coutumes de la Mer*, quarto, p. 101, note 6,) it is said, "In case of jettison, if the master receives freight for his whole cargo, the same shall be included in the general contribution;" although the ship, in the same ordinance, on such an average, is rated at one-half her value. And in ch. 98 it is expressly declared, that the freight saved shall contribute for its full value, the same as do the goods saved; (2 *Pardessus*, 103, note 3;) and the compiler points out the error of Bourdier in his translation of ch. 98, in this respect.

The Laws of Oleron (8) declare, that losses by jettison are paid in full out of the vessel or freight, at the discretion of the master. (*Zouch, Appendix*, 169, 170.) So in various sea laws and ordinances collected by Molloy, (*B. 2, ch. 6, § 12, pp. 12, 13,*) it appears that the contribution was laid upon the whole value of the freight.

The ordinance of Philip II., of 1563, at Antwerp, so allots it, and the same usage had prevailed in the northern parts of Holland before 1300.

La Recopilacion de Leyes de las Indias, in Spain, and the statutes of Genoa, lay on the ship a contribution both for the whole of her value and freight; and the ordinances of Koningsburgh and Hamburg agree that the ship is to contribute to the same extent for the whole of her value and freight.

Molloy refers to some instances amongst the old edicts in which the contribution appointed is less than on the whole value of the freight; but their general bearing and usage puts the gross value of the freight in contribution. Stevens quotes Van Weytsen, (*Traité des Avarie*, 1563,) who concludes his examination of the subject, by saying, "that in reason and justice they ought to carry in common contribution the whole value of the vessel, as well as the entire freight which the master receives for the voyage." (*Stevens' Average*, 52; 1 *Pardessus us et coutumes de la Mer*; *Laws of Oleron*, art. 8, note 2, p. 329; *Ibid.* art. 31, note 5, p. 344.)

The considerations adverted to will lead me to place this decision on that basis, and to direct the freight to be charged on the adjustment at its full value at the place of disaster. The proceeds and part of the cargo being arrested in this port, the adjustment will then be made up conformably to the rules governing the subject here; preserving, however, a common basis of contribution in respect to freight, either to it, in satisfaction of its loss, or from it, contributing to the common loss.

The decree adopted in this case will meet the other points also brought forward on these motions, and determine the terms of the adjustment to be carried into execution under the judgment of the Court.

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The Court accepted, and ordered to be entered the following form of decree in the case :

This cause having been further heard in respect to the form of the order or decree to be rendered therein, and due consideration being had of the premises, it is considered and adjudged by the Court, that the libellants recover against the proceeds of the cargo in the pleadings mentioned, a contributory part on general average in proportion to the value of the cargo saved (represented in whole or in part by the said proceeds) bore to the cargo on board paying freight. And it is further ordered and adjudged, that for the purpose of such contribution, the said ship be estimated at her value at her port of departure, when the voyage in the pleadings mentioned commenced: such value to be proved on the part of the libellants, subject to such deduction for wear and tear up to the time of her loss, as on the part of the claimants shall be proved to be reasonable; and also deducting all sums received by the libellants on sale of said ship, or any part of her tackle or apparel, after the stranding in the pleadings mentioned. And it is further ordered and adjudged, that the cargo laden on board be valued for the purpose of contribution, at the prices stated in the invoice and bills of lading thereof, or either, if both cannot be produced, deducting therefrom salvage and other necessary charges incurred in consequence of the wreck of said ship. And it is further ordered and adjudged, that the freight of the said ship be contributed for at its gross value, and that the freight saved after the wreck also contribute at its gross value, being the amount contributed for in the general average, deducting therefrom all necessary expenses incurred (if any) subsequent to the wreck

aforesaid. And it is further ordered and adjudged, that it be referred to the clerk of this Court (or, at the option of the parties, to an auditor, to be selected by their respective proctors) to adjust and state the average in this district, conformably to the directions of this decree, and that on such reference the proof produced on the hearing of the cause, and such other evidence as may be pertinent and competent, may be offered by either party, subject to all legal exceptions. And it is further ordered and decreed, that on the coming in and confirmation of the report of the clerk, (or auditor,) the libellants may take and enter a final order, that the claimants, Josiah Macy and others, in the pleadings named, and holding in their hands part of the proceeds aforesaid, pay over to the libellants respectively the sums so reported to be due them, or the rateable proportion thereof, according to their respective insurances, with interest thereon, from January 10, 1842, to the amount of the said funds in their hands, if necessary for that purpose. And it is further ordered and decreed, that the libellants recover their costs to be taxed, to be paid out of said proceeds, but no decree or process by virtue of the proceedings of foreign attachment is to be taken *in personam* against any party in the pleadings mentioned.

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JAMES COLLINS v. FRANCIS HATHAWAY AND OTHERS.

The act of Congress of July 20, 1790, in relation to seamen's wages, does not compel all the seamen suing in *personam* for wages earned on the same voyage, to unite in the action.

The peremptory provision in the act applies only to cases in *rem*. But the policy of the statute embraces suits in *personam*, and this Court encourages joint actions to be prosecuted in that case also.

Costs are technically awarded to parties, but substantially they belong to the proctor to the suit, and the Court will uphold his right to them against acts of the principal to his prejudice.

Where several seamen unite in an action in *personam* to recover wages, all of whom, except one, obtain decrees for \$50 and over, which are appealed to the Circuit Court, and a decree is rendered in favor of the other libellant for less than \$50, he can tax full costs in his own name, and perfect and enforce, by execution, his decree for wages and costs. The causes of action and the final decree are all separate, and the remedy is as in a separate action.

The rule relieving seamen from stipulations for costs produces no unreasonable inequality as against ship-owners.

An irregularity in the taxation of costs may be corrected by the Court, on motion, after final decree rendered.

The practice is liberal in allowing a re-taxation of costs, where, by mistake, misapprehension or other casualty, a party failed opposing the original taxation, particularly where the costs claimed are large.

BETTS, J.—This case has been reserved a considerable time since the hearing, in order to ascertain whether the points involved in it have been before considered and decided in this Court, and also to await an opportunity to confer with the Circuit Judge upon the question of practice common to both Courts, which composes the gravamen of this application.

No decision is produced bearing upon the question, and the continuing absence of the Circuit Judge will delay a conference with him on the point of practice for several months. At the request of the proctors of

the respective parties, judgment will therefore be no longer suspended.

The libel was filed by several of the crew of the bark Florida, for wages. On the final hearing, wages were decreed the several libellants in distinct and different sums. The present libellant was awarded less than \$50, and that decision not being appealable, the decree in his favor became final. His co-libellants each recovered above the sum of \$50, and it appears, *apud acta*, that the respondents have appealed from that portion of the decree, and that the appeal is now pending in the Court above.

This libellant proceeded to perfect the decree in his favor. He made up a bill of costs, which embraced all the charges incurred in the joint action of himself and co-libellants, and had it formally taxed. Execution has since been issued to collect those costs, together with the amount of wages decreed to him.

The respondents, by this motion, apply to the Court to set the proceedings aside, because the taxation of entire costs was unauthorized and irregular, or that a re-taxation or appeal from the one made, if that was regular, may be granted them; but the motion rests more especially on the objection that a single libellant is not entitled to recover to himself individually the entire costs accruing in a suit of which he was only one of several promovents.

The assumption that parties obtain, personally, the costs awarded on the decision of a suit in prosecution, is essentially erroneous. It is so only theoretically. The general decree gives the costs nominally to a party in the action, but in reality nothing passes by it into his hands, beyond the reimbursement of witnesses'

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fees, or advances actually made by him to other ends than the payment of his proctors' and advocates' fees. The taxed costs belong to them, and their rights thereto will be protected by the Court against the exercise of any authority over them by the party himself to their prejudice.

The bill of costs taxed in this case includes nothing which is payable to the libellant personally. It consists of proctors' fees, witnesses fees and charges by officers of the Court. These accrued, and were necessary alike for one as for all the suitors, and are incurred to the same amount, whether the recovery is fifty dollars alone or above that sum.

The facts upon which the action was maintained in this case were common to all the libellants, and were supported by the same testimony. The evidence in bar of the action was also the same against all the libellants. The diversity of proof, so far as there was a difference, related mainly to the defence, going to show that each libellant could not claim an equal amount of wages. But on the defence, alike as with the demand, the material inquiry was into the facts attending the wreck of the vessel, and whether those facts secured the libellants their wages, notwithstanding the loss of the ship.

This party has, in the judgment of the Court, maintained his right of action on the merits, and showed an unpaid amount of wages earned, for which he obtained a decree, and nothing brought forward on the part of the respondents on this motion shows that if the suit had been in the sole name of the libellant, the items of legal charge would be at all different.

The act of Congress (1790, ch. 56, § 6) imposes the

necessity on the crew to unite in an action against a vessel for the wages of a common voyage; but no individual seaman would be placed in a worse condition, in complying with that law of prosecution, than if he sued separately. He in no respect stands responsible for the right of his associates to recover, nor is the decree joint in case all recover, and each exactly the like sum. Notwithstanding such blending of parties, the judgment of the Court is for or against each as an independent suitor. That regulation of actions does not in terms include suits brought by seamen for wages against the master or owner of a vessel. They may, undoubtedly, then exercise their common law right, and each sue for himself. They are, however, within the fair policy of the act, and this Court, to secure simplicity and expedition in this class of actions, and avoid expense, encourages the junction of the crew, alike in suits *in personam* and *in rem*.

Had the libellant brought his separate action in this instance, he would, as the common incident to the recovery of wages, also be entitled to full taxable costs. The act of Congress would operate oppressively upon a seaman, if under it he is compelled to stand the risk of the right of action of those with whom he is associated, and thus be deprived of costs, or exposed to be charged with costs, on their being defeated. And the course of the Court sanctioning this junction of causes of action, might, in such cases, become more injurious to them than if they sued as individual parties. By protecting, in this manner, the seamen who are successful in their portion of the suits, those proceeded against may also have their rights substantially preserved; because those libellants defeated on the hearing, or whose decrees may thereafter be reversed on

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appeal, may, at the discretion of the Court, be compelled to satisfy the costs created against the adversary parties. Such compensatory costs is the only indemnity provided by law for litigant parties against each other, when one establishes no right of action or sufficient defence.

This is in consonance with the rule at law, where no apportionment of costs is made in case of several prosecutors, some of whom obtain judgments, and others have judgments rendered against them. The successful party on each side recovers full costs against his adversary. (2 *R. S.* 616, § 18; 3 *Wend.* 326.)

It is urged that the rule of Court permitting seamen to sue for wages without filing stipulations for costs, (Rule 45,) supplies no reciprocity to ship-owners, as they are compelled to contest unfounded claims put in prosecution by transient and irresponsible persons, without any indemnity by costs where such actions are defeated, and that because of such disfavor to ship-owners and masters in defence of those actions, the Court, in allotting costs, should confine the allowance to the strictest share of each sailor, in the general bill of costs.

I think there would be no difficulty in vindicating the provisions of the rule on general principles, and in showing that the preponderance of privileges in the matter of wages between the two classes, lies heavily against seamen and in favor of masters and owners.

In case of the capture or total loss of the ship on the voyage, the mariner loses all wages, (*Abbott*, 457,) though the owner may cover wages in his policy on freight as part of the cost of earning it; (3 *Kent*, 269, 271; 1 *Phillips Ins.* 316;) and thus receive and pocket the entire amount. And the Circuit Court, in this dis-

trict, has decided that in cases of abandonment by the owners for a technical total loss, although the ship and her cargo was navigated to port after her injury, yet the crew had lost their wages.

The postponement of the payment of wages to ten days after the unloading of the vessel, and compelling a seaman, after the voyage is fully ended, to summon the master or owners, and prove a balance due him, before he is allowed to institute an action for its recovery, are all privileges protective to the merchant solely, and in derogation of the common law rights of sailors.

The exemption in this Court of seamen from giving security for costs is but a slight boon in comparison with the material privileges accorded owners of ships as against them, without including, in the enumeration, the abrupt confiscation of their earnings on the longest voyages, for a needless absence of 48 hours from their ship.

The slender relief afforded by the rule is not peculiar to this Court. It is sanctioned by the highest English authority, (1 *Hagg. R.* 220,) and is believed to be in consonance with the usage of Admiralty Courts in the United States. (*Dunlap's P.* 102, 303.)

I think, therefore, the libellant in this case is entitled to full costs of suit, without regard to the possible disposition of the case in respect to his co-libellants. The respondents may be reimbursed the payment in case the decree against them is reversed by the appellate Court, by costs awarded them therein, if that Court considers them equitably entitled to costs; and that Court can also give adequate relief to the seamen who are separated from the joint action, by awarding them an indemnity in costs in that Court.

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The Court cannot speculate upon a probable reversal in the Circuit Court of the principles of law or their application, which governed the decision of this Court in favor of the libellant. That decision must stand as the law of the case until disaffirmed by the appellate Court. If such reversal occurs, it does not follow but that the libellants may even there be awarded costs, for if an equitable and probable cause of action existed in their favor, the Court above may secure them their costs, although they fail recovering wages. (*Dunlap's P.* 152.) Moreover, an inferior Court ought not to stay its hand in administering what it regards the law of a case, under apprehension that a superior tribunal may hold a different opinion upon it. There is nothing extraordinary in a cause experiencing alternations of affirmances and disaffirmances during its progress before tribunals of different grades. Nor is it at all without precedent, that solemn adjudications of Courts of last resort are recalled, modified or annulled by their own subsequent action.

The proctor of the respondents alleges that the taxation of costs in his absence on the part of the libellant was irregular; or if the proctors of the libellant were justified in their practice, he lost his opportunity of renewing his objections to the charges, from misapprehending the times of hearing before the taxing officer, and also in being misunderstood by the taxing officer as to the reservation of his right of appeal. The proctors of the libellant put in a contradictory statement of facts touching the mistakes or misapprehensions set up on the other side, and insist their practice was regular; but irrespective of the question of strict regularity, the usage of the Court is, whenever colorable grounds are

shown for revision of taxation, to give to the parties interested an opportunity for review by re-taxation, although they may not, on their part, have scrupulously pursued the accustomed course of practice.

The bill taxed in this case is large in amount, being \$434.88, exclusive of clerk's charges, and the respondents ought not to be concluded from relief in the matter, even if laches may be imputed to their proctor, since the libellant is no way prejudiced by the lapse of time.

The Court is not disposed to infer any unnecessary delay or neglect in applying for a re-taxation, but considers the proctor acted in good faith, under the persuasion that he might have the bill of costs legally adjusted whenever the libellant should seek to collect it.

It is accordingly directed, that the respondents may, at their election, take out an order for the re-taxation of the costs before the proper taxing officer, or accept the proposal of the libellant's proctors if renewed, to have the items objected to on the taxation and noted at the time by the taxing officer as appealed from, deducted from the bill.

In case of such arrangement, the bill to be deemed taxed at the amount left after such deductions. But in case a re-taxation is had, each party will possess the usual right of appeal therefrom.

The respondents, if they proceed to a new taxation, must give notice to the libellant's proctors of the time and place, and pay the costs thereof.

Burr & Benedict, for libellant.

D. Lord, Jr., for respondent.

The Schooner Harriet.

THE SCHOONER HARRIET.

Under the rule of this Court, in suits *in rem* for services on board of vessels on the North River, a libellant cannot recover costs when less than \$50 is in demand, if he had a clear remedy therefor known to him, in the local Courts. The onus is upon the claimant to show that the libellant had such remedy, to entitle himself to a decree for costs.

The object of this rule was to prevent an unnecessary resort to the expensive proceedings *in rem*. It will not be so enforced as to compel the mariner to resort to the local Courts, only in case his remedy there is convenient and sure.

A similar doctrine prevails in the civil law, and is also employed as a means for preventing the creation of costs unnecessarily in the prosecution of demands.

Marbury, for libellant.

Shufeldt, for claimant.

BETTS, J.—The libellant sues *in rem* by a summary proceeding, to recover wages earned by his son, a minor, as a hand on board the schooner Harriet, making trips from Saugerties, Ulster County, to Troy, Albany, Hudson, New-York, Brooklyn, and some other ports on the East River.

The testimony of the boy proves the services to have been rendered, and that \$17 25 is due for his wages. This evidence is corroborated by other witnesses, except as to the balance due. They were unable to testify to that point.

The claimant attempted, by cross-examination of the boy and the exhibition of his own memorandum book, to prove that a larger amount of payments had been made him, but in this he was unsuccessful, and nothing

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was elicited to conflict with his evidence in chief as to the actual balance due.

Upon the facts proved, in my opinion there can be no doubt that the libellant is entitled to recover, as claimed, \$17 25, with interest from the first of August last. Indeed, this is not very seriously controverted by the counsel for the claimant, but the point most discussed and relied upon arises on the question, whether the libellant shall recover or pay costs in this Court and in this form of action.

It was proved by the boy, that the claimant, who is master and part owner of the schooner, lived in the same township with, and but four or five miles distant from the libellant, and that the libellant made the bargain personally with him for the services for which this suit has been instituted. The claimant further proved that he occupied a house and a small piece of land at that place, as owner, and had money at interest, \$700 at one place and \$200 at another.

The rule enforced in this Court in this respect is, in suits *in rem* for services on board vessels upon inland waters of the State, the libellant shall not recover costs, if he had a clear remedy known to him, in the local law Courts.

Where the owner or master, hiring a mariner for that service, is of undoubted responsibility, and can be proceeded against conveniently by the mariner at his place of residence, and the seaman chooses to resort to the expensive process of the Admiralty, his costs of suit should be borne by himself, and not be thrown upon the owner. The debt may be collected with equal celerity and certainty in a Justice's Court at a charge of a few shillings, as before this tribunal under the bur-

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them of costs exceeding the amount of the debt. To show that his case does not fall within the principle of the practice, the libellant offered evidence of common report, and the opinion of the neighbors, that the claimant was largely in debt, and dilatory and evasive in satisfying obligations against him, and that it would be difficult to reach his property, if he actually owned any, by process from the local Courts. The testimony is not so definite and direct as to establish the *fact* that debts could not be so collected from the claimant, but they afford a colorable cause or warrant for the libellant to attach the vessel in the first instance, and impose on the claimant the *onus* of showing that the other method would afford a sure remedy to the libellant, without his resorting to an attachment out of this Court.

The testimony offered by the claimant tends to strengthen the doubt as to a clear remedy for the recovery of small debts against him at law. His brother testifies to his ownership and possession of the house and lot of land, but no evidence is offered that he had a dollar's worth of personal property, subject to execution, out of which the debt could be secured in case the libellant obtained judgment against him, and real estate is not bound by such judgment.

He is not subject to imprisonment for the debt, and it is not made to appear that the libellant would be in a better condition to make the money by aid of a judgment in a Justice's Court than without one. He applied for payment three several times to the claimant personally without success, and under the circumstances, I am satisfied he was justified in taking his proceeding in the first instance against the vessel. A principle similar to that invoked by the claimant obtains in Courts of

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civil law. If the defendant, upon being sued, pleads *in limine litis*, that no demand was made upon him for the debt before the institution of the suit; that he was, and still is, ready and willing to pay the demand claimed, he will not be mulcted in costs; but if no demand was made, and he defends the suit upon other grounds, he is liable for costs. (*Brown et al. v. Sand*, 4 *Martin N. S. (Lou.)* 438; *Howard et al. v. Steamboat Columbia*, 1 *Lou. R.* 420.) The object of the rule was to prevent an unnecessary and wanton resort to the somewhat severe and expensive process allowed in Admiralty; but it would counteract the policy which protects a mariner's earnings, to put him to the expense and delay of a suit at law, in order to ascertain whether he could, in that way, recover the wages due him. He should rightly and in equity be restricted to that method only in case his remedy thereby is convenient and sure. I shall, therefore, order a decree to be entered up for the libellant for the wages as above stated, with summary costs to be taxed.

The Pilot-Boat Blossom.

THE PILOT-BOAT BLOSSOM.

It is not culpable or improper conduct for the officer on deck to take the helm of a vessel, and to receive and act upon the direction of the look-out as to the mode of steering her.

A vessel running with the wind free, must give way to another close-hauled, without regard to their respective tacks.

Sailing vessels, coming into port in the night time, are not bound to carry lights.

Pilot-boats, equally with other vessels, are guilty of gross negligence by running in the night time without a competent look-out stationed forward on the deck.

The man at the wheel is not a sufficient watch to fulfil the obligations of the boat in that respect.

The damages in case of collision, to be adjudged against the party in fault, must be sufficient to restore the injured vessel to the condition she was in at the time of the collision.

Actual injuries only are to be compensated for. The Courts do not consider hypothetical or consequential damages.

THIS suit was instituted for the recovery of damages occasioned by a collision, on the 19th day of December, 1843, at sea, in the night, a few miles off Sandy Hook, between the schooner Harriet Smith, owned by the libellant, and the pilot-boat Blossom, owned by the claimants.

The schooner was coming into this port from sea, and the pilot-boat was on her way out in pursuit of pilotage business. By the pleadings and proofs it appears the wind was about W. S. W., the schooner was heading about N. N. W., and pilot-boat about S. S. E. All these were estimated courses.

The schooner was struck about a foot forward of her stern, on the starboard quarter. Three stanchions were

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broken, part of the taffrail split, the bulwark torn about eight feet, and the whole stern racked and broken by the blow.

The repairs cost thirty-one $\frac{30}{100}$ dollars, but the ship-carpenter testified, that in his judgment, the injury to the schooner, in consequence of the collision, was from two hundred and fifty to three hundred dollars, and that the schooner could not be replaced in a condition as good as before the injury without taking up her deck, and taking out the knees, &c. She was well manned and found.

The pilot-boat was outward bound on a cruise, with a complement of six persons on board, all of whom, except one, an apprentice at the helm, were below at the time of the collision.

The night was dark ; and so dark, it was contended for the claimants, that it was impracticable to discover the schooner far enough off to afford the pilot-boat any way to avoid her. The pilot-boat carried a lantern under her bow. She had no look-out forward, and no person on deck other than the man at the helm.

The schooner had two men stationed forward on the look-out, one on the lee and the other on the weather bow. They and the mate, who was at the helm, testified that they saw the light of the pilot-boat the distance, they supposed, of a mile or more off, and the two on the watch both saw the boat itself coming upon them several times its length off, before she struck the schooner.

The schooner showed no light. There was contradictory evidence respecting the usage or custom on the coast for sailing vessels to carry lights, and also as to the utility and prudence of doing so.

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The mate of the schooner took the helm, and ordered the men keeping the look-out to give him directions how to steer in respect to objects ahead. Evidence was given by the claimants to show the custom and usage of pilot-boats off this port to run in the night time with no more men on deck than the one at the helm.

The cause was argued by

W. Q. Morton, for the libellants.

F. B. Cutting, for the claimants.

BERRA, J.—It was argued for the pilot-boat that there was carelessness and want of due care and precaution in not carrying a light on board the schooner, and also in the officer of the deck taking the helm himself, and trusting to a common sailor to keep a look-out, and give orders how to steer.

I do not consider those suggestions of any weight, because, if the mate had taken a position on the quarter-deck or mid-ships, he must have shaped his orders to the helmsman from the report of the look-out. Indeed, I apprehend the uniform usage is for the look-out to cry the direction to be given the helm, and for that call to be obeyed instantly, unless countermanded by an officer. The maritime law does not oblige sailing vessels to carry lights at sea in dark weather.

The testimony as to the extreme darkness of the night is in conflict between the witnesses on board the pilot-boat and those on the schooner. The preponderance in numbers is with the latter, and their opportunity for observation was also superior to that of the others; and the opinion given by the schooner's men,

that the night was not so dark but that the schooner might, at the time, be seen from another a distance far enough off to avoid her, is corroborated strongly by the occurrences succeeding the collision.

Immediately after striking the schooner, the pilot-boat glanced past her stern, was brought about into the wind, in order to ascertain her own damages, &c. The men below ran on deck, and one of them testifies, that after he got there, the vessels had separated, and he supposes were twenty yards apart, and that the schooner was under way going ahead.

It is not to be supposed, in the confusion of such a moment, that the witness could estimate time or distance with any accuracy, and the circumstances tend to prove that the vessels must have separated more than twenty yards, and probably five times that distance, when so seen by him.

When they struck, both were under full way, with a united speed of ten or twelve knots, and the headway of either was not apparently checked by the collision. The schooner's stern was canted off to windward, and her bow thrown round more leeward, so that her sails were nearly filled, and this position would more probably increase than retard her speed. The supposed movement of the two in opposite directions being about 1,760 yards (one mile) in five minutes, they would separate twenty yards in four seconds; and if only half a minute is allowed for the witness to be awakened by the shock, get on deck and make his observation, the vessels would, at that rate, be 140 or 150 yards apart.

Almost instantly after the collision, another pilot-boat hailed the schooner, and asked if she wanted a pilot. Accordingly, she must have been seen from the pilot-

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boat, and it was judged by the sound of the hail she was 100 yards distant. In my opinion, the claimants do not succeed in proving the collision was owing to the extreme darkness of the night, and thus an inevitable accident.

The clear weight of evidence is, that it was not so dark but that the schooner could have been seen from the Blossom at the time, at such distance as to have enabled the pilot-boat easily to escape her.

It is strenuously argued for the claimants, that the schooner must be considered running with the wind free, or if she was on the wind, her larboard tacks were on board, and that accordingly it was her duty to give way for the Blossom, which was going close-hauled, with her starboard tacks on board, and was thus privileged to hold her course. That accordingly the fault of navigation, in this respect, was with the schooner.

This state of the schooner is deduced from the course of the wind, and her steering, as estimated by the witnesses; and in the judgment of nautical men upon those data, the schooner must have been on a free wind.

The statements of the points of the wind or course of the vessel are not made from observations of the compass; they are merely the judgments of witnesses, and may doubtless be deemed correct in a general sense; yet the fact is explicitly testified to by three witnesses, who were on the deck of the schooner, that she was close-hauled, hugging the wind, and the helmsman of the Blossom says his boat was running out free, with the sheet off. These facts must outweigh all hypotheses drawn from charts or diagrams framed upon the supposed line of direction of either vessel. The fact positively asserted by uncontradicted witnesses, that the

schooner was close-hauled upon the wind, that the pilot-boat was running free when they met, overbears all opinions of experts, that on the given course of the wind and steering of the vessels, both of them ought to have been alike close hauled or running free. The nautical rule is clear and positive in such case, that the vessel sailing free must avoid the one close-hauled, if not prevented by insuperable obstacles. (2 *Dods*. 85; 3 *Hagg*. 318; *Westminster Review*, No. 42, p. 65; 3 *Kent*, 230.) On these facts it was the duty of the pilot-boat to give way, leaving her free course to the schooner.

I do not, however, make this the controlling consideration in the case, nor give weight to other particulars urged on the hearing, as that the schooner, being laden and inward bound, was entitled to keep her way under like circumstances against an outward-bound vessel in ballast; or that trading craft have that privilege specially in relation to pilot-boats, whose business it is to edge close upon vessels coming into port, to speak and board them if necessary, and are not to be regarded as having the privilege of vessels making regular voyages.

But, in concurrence with the leading authorities in the federal Courts and in England, I hold the pilot-boat did not use due care and precaution in running along the coast in the night time without having a competent lookout properly stationed on her deck. (*The Rebecca*, *MSS*. * 3 *Kent*, 230; *Story Bail*. § 611; *The Chester*, 3 *Hagg. R.*) It was culpable negligence to trust this duty to the helmsman alone. His attention must be essentially occupied with his own vessel, and her safe management will leave him imperfect means for observing objects outside of

* Since reported, 1 *Blatch. & How*. 247.

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her; and if he may occasionally take a view off her, yet that is not his chief or most important employment.

In the case of *The Emily*, in this Court, (*ante*, page 132,) this point was fully considered; and the vessel which had not a look-out properly stationed, independent of the helmsman, was pronounced in fault, and liable for injuries sustained by collision with others, which were managed with ordinary care and skill.

The same rule must be applied in this case. The claimants fail proving the alleged custom and usage of running pilot-boats in the night time, without a look-out properly stationed forward, independent of the helmsman. Such usage, however largely practiced, could never be received in a maritime Court as a justification. It is repugnant to all sound rules of navigation, and palpably dangerous to life and property at sea. I should not hesitate to pronounce it grossly culpable conduct to sail a vessel in the night without a sufficient watch stationed forward on her deck, whatever evidence might be given of the practice or custom in that respect. The more general such practice shall prevail, the more necessary it would become for the Courts to discountenance and correct it by the severest condemnation and penalties.

I do not regard the accident one inevitable to both parties, but hold, on the proofs, that it resulted from the want of due skill and care on the part of the *Blossom*.

The damages of the libellant are not to be limited to the mere cost of repairing the schooner. The libellant is entitled to a reparation of his actual injury, that is, his vessel should be made to him staunch and serviceable to a like degree as she was before the collision;

but he cannot recover for supposable or consequential damages.

The repairs made did not place her in the sound condition she was before this injury; nor is an estimate given of what it will cost to take up the deck, and replace knees, &c.; and in the absence of such estimate, it may be safely concluded that a like expenditure with that already made, will be needed to furnish such repair.

I accordingly decree that the libellant recover \$62 60, with his costs to be taxed; but as this valuation may be regarded by the parties below or beyond the actual value of the work required, leave is given to either party to take a reference on the point, as to what it would cost to place the schooner in as serviceable a state as she was before the collision.

If both parties do not unite in the reference, then it is to be taken at the expense of the one asking it.

The Schooner Romp.

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By the common law, an absolute bill of sale of chattels, unless accompanied by possession, is void as to creditors and *bona fide* purchasers. The *bona fides* of the transaction, as between the parties, and the fact that the possession remained with the seller for justifiable purposes, would not vary the rule.

Even if the arrangement between the mortgagee and mortgagor was that the latter was to remain in possession of the vessel until the mortgagee had a reasonable opportunity to enforce his mortgage, still this would not affect the rights of *bona fide* purchasers for a valuable consideration.

Upon the question of the *bona fides* of a purchase of a chattel, this Court will determine the facts upon the principles which govern trials by jury.

Conditional sales, which may be regarded valid without a change of possession, have reference to a conveyance upon a condition other than the repayment of money loaned.

The sale of a vessel at public auction for a valuable consideration to a purchaser ignorant of any mortgage, and who had bought after seeing her papers, if it would not give an absolute title of itself, would show such laches on the part of the mortgagee, that he would not be permitted to set up any priority.

The mortgage lien will not be sustained, although put in suit the first opportunity by the mortgagee, against subsequent purchasers without notice.

It is a principle of equity that an encumbrancer upon various parcels of property must exhaust his remedy against that remaining with his debtor, before he resorts to that portion held by *bona fide* purchasers, or under junior encumbrances.

Benedict, for the libellant.

Bradford, for the claimant.

BERRS, J.—This was a suit *in rem*. The libel, filed July 20, 1841, alleges that Ezra Brown, about the first of December, 1838, being indebted to the libellant in the sum of \$8,746- $\frac{2}{3}$ for a cargo of rice furnished the schooner Romp, at Georgetown, in the State of Georgia, gave him a promissory note for that amount, bearing date December 3, 1838, payable one day thereafter;

The Schooner *Romp*.

and in order to secure the payment of the note on the same day, executed in his favor a mortgage on the schooner, then in the port of Georgetown, owned by Brown, belonging to the port of Baltimore. The libel sets forth the mortgage by which the vessel was hypothecated. A copy of the instrument is in evidence, and recites the indebtedness of Brown to the libellant, and the giving of the said promissory note, and adds, that "for the better securing the payment of said note, and holding the said Waterman harmless in his endorsements on my drafts for the said sum in the aggregate, do hereby sell, set over and deliver to the said Waterman my two vessels, called the *Romp* and the *Morning Star*, and also a lot of land; (particularly described;) to have and to hold the said vessels, their freights, charters and emoluments, and the said land and its improvements, as they are each set forth in the bills of sale, policies of insurance and a deed of conveyance, and as they are each set forth in the papers appertaining thereto, which I have this day left in the possession of the said E. Waterman, which are all complete, with the exception of the schooner *Morning Star*, which vessel being solely my own, and paid for by me, this may be regarded as my full bill of sale and legal transfer for her, with the tackle and apparel; as also for the land and the improvements."

It then proceeds to state "that the condition of the above obligation is such, that if the said E. Brown, or his drawee, Willard Rhodes, of Baltimore, shall well and truly, and without fraud and delay, meet and pay the drafts of the said E. Brown, within seventy days from the date of these presents, then this obligation to be void, otherwise to be in full force and effect; and

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the said E. Waterman to have, in addition to the property hereinbefore conveyed and set over to his exclusive use, the usual damages of ten per cent., and the charges of collecting the debt aforesaid, without litigation, in any State in the United States, and to claim the said vessels in any part of the world."

The libel also charges, that the bills of sale, policies, &c., on said vessels were delivered over to the libellant, at the same time, to be held, with vessels, as security.

That Brown failed to perform his covenants, and that the whole of said debt remains due and unpaid, with interest and damages, "which the whole of said securities is insufficient to pay."

That before the mortgage was to become due, the schooner left the port of Georgetown, and from that time hitherto the libellant has been unable to reach her for the purpose of pursuing his lawful remedy, until informed that she was in the port of New-York, and that "he has been unable to find the schooner *Morning Star*." The libellant prays the attachment of the vessel, a decree in his favor for the debt and sale of the schooner, and that the proceeds be applied to the payment of his demand.

The answer avers that the claimant is the true and lawful owner of the schooner *Romp*, her apparel, &c., by *bona fide* purchase, and denies all knowledge of the mortgage set up by libellant, and of the authority of the mortgagor to give it, or of any consideration for it. The answer further alleges, that no change of possession of the schooner accompanied the execution of the mortgage; that it was fraudulent against the claimant, and subsequent *bona fide* purchasers who bought her, for a valuable consideration.

On the hearing, the libellant produced and offered in evidence the mortgage deed, and the debt for which it was executed, as also the protest of the drafts in Baltimore, and his payment of them to the holder.

On the part of the claimant, it was proved that he purchased the schooner at public auction, in the city of New-York, on the 29th June, 1841, for \$1,000, took possession of her, and fitted her for sea, and that she was arrested in this action two or three days before her day of sailing. She was owned, when so sold, by F. Belden.

It was further shown that the vessel had been previously sold at public auction, at Havana, in the Island of Cuba, in behalf of Ezra Brown, the mortgagor, to George Knight & Co., of that place, on the first day of January, 1839, and was purchased by Richard S. Hubbard, for \$3,800, and that the purchaser had no notice at the time of the existence of the mortgage or other lien upon the vessel; and that the original bill of sale of the schooner to Brown was left in the hands of the said George Knight & Co., who were agents of the schooner, and also of the witness, (R. S. Hubbard,) before and after the sale to him.

There was no note or memorandum endorsed on the papers of the schooner, of any mortgage incumbrance. Brown was named as sole owner on the register.

On the 31st March, 1840, Hubbard sold two-thirds of the vessel to Jonathan H. Hudson and Thomas H. Stevenson, for \$2,665 $\frac{1}{3}$. These purchasers had no notice of any mortgage or other lien held by the libellant on her.

In 1841, Frederick Belden bought the schooner in Apalachicola, Florida, from the agents of Hudson &

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Stevenson, for \$1,200. Hubbard had previously conveyed his one-third to Stevenson, and the purchaser had no notice of the mortgage.

The libellant produced a bill of sale of the vessel to E. Brown, which he alleges was left in his hands at the time the mortgage was executed, but offered no proof of that fact, or of the genuineness of the bill of sale.

The claimant contended that under the facts in proof, the mortgage was inoperative and void as against subsequent *bona fide* purchasers, without notice, and that if it should be deemed valid, the libellant, before he can enforce it against the vessel to the prejudice of such purchasers, must show that he has exhausted his remedy against the other property included in the mortgage, and owned by the mortgagor.

My opinion is, that the first point is well taken, and being decisive of the case, it will be unnecessary to determine the other, although that also might be conclusive in equity against the action. The mortgage, upon its face, is an absolute transfer of the schooner, without any provision qualifying the possession.

It is asserted, argumentatively, that it was manifestly the intent of the transaction that possession should remain with the mortgagor, because seventy days were allowed him to redeem the incumbrance, and also because it was stipulated therein that the mortgagee might claim the two vessels in any port of the world, in case the condition of the conveyance was not fulfilled.

I do not deem it material to determine the signification of those provisions in the mortgage conveyance, because, being stipulations between the mortgagor and mortgagee solely, and never made known to the claim-

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ant, directly or by implication, they could not, upon the authority of any case referred to, uphold the incumbrance indefinitely, or to the prejudice of after purchasers.

The mortgage was executed December 3d, 1838, and the claimant became the *bona fide* purchaser of the schooner for a valuable consideration at public auction, on the 29th of June, 1841. This, in law, bars the assertion of a mortgage lien against him, even if the arrangement be understood as continuing the possession of the vessel with the mortgagor until the mortgagee had a reasonable opportunity to enforce the mortgage by legal process.

The libellant insists that the case of *De Wolf v. Harris*, decided in the Circuit Court of the First Circuit, (4 *Mason*, 515,) settles the rule that such continuing possession does not affect the priority of his incumbrance on the vessel.

The ship Ontario, ready for sea on a voyage to Canton, was conveyed with her cargo and its after proceeds, by absolute assignment, from her owner to the plaintiff. The conveyance, however, was intended as a security to cover debts then owing the assignee by her owner, and thus operated equitably and at law as a mortgage only. The ship lay at this port thirty days after the execution of the assignment. The assignee did not take possession of her, but permitted her to make the voyage in possession of the mortgagor; no notice of the assignment was given on the ship's papers.

In a controversy between the assignee and the creditors of the mortgagor, Judge Story held, that this being a New-York transaction, was to be determined conformably with the New-York law, and that *Bissel v.*

The *Johnson Pump*.

Hopkins (3 Conn. 144), was a case directly in point, establishing the right of a mortgagee of chattels to enforce his security in preference to other creditors, although possession of the property was left with the mortgagor. He also regarded the title of the mortgagee protected by the general law. The correctness of this decision, in so far as it rested upon the case of *Blond v. Hopkins*, must be considered questioned, if not overthrown, by the subsequent cases in the State of New-York, of *Durier v. McLaughlin*, (3 Wend. 596,) and *Gardner v. Adams*, (12 Wend. 257; 2 Kent. 515-532.) The Revised Statutes have since declared that such conveyances are absolutely void against the creditors of the vendor, or a subsequent *bona fide* purchaser, unless those claiming under the assignment prove it was made in good faith and without intent to defraud. (2 R. & 2d ed. 70, § 5; *Revised's Notes*, 3 R. & 657, *ad idem*; 2 Kent, 5th ed. 529, *note*.)

No direct evidence of such *bona fides* has been offered by the libellant in this case; but it is fairly to be implied, from all the proofs, that the security was given and taken without intention to defraud, and that the owner was allowed, in good faith, to retain possession of the vessel to enable him to fulfil and carry out the condition upon which the assignment was made. The Court, in this class of cases, determine the facts upon the principles which govern trials by jury, and a jury would be well warranted in law in declaring this conveyance valid. (24 Wend. 186; 26 *Ibid.* 511; 1 *Hill*, 421; *Ibid.* 428; 4 *Hill*, 271.)

But if at this time the right of the libellant under the mortgage would be preferred in the Courts of this State to that of the subsequent purchaser, this action

cannot be governed in the national Courts by rules of law peculiar to the State of New-York. It has not been shown that the law of South Carolina, where the conveyance was executed, varies from the general law, if that fact would uphold the conveyance here; and accordingly the principles recognised by the federal Courts, or the English tribunals, are those which must control the question on this hearing. If the conveyance in this instance was absolute, the case of *Hamilton v. Russel* (1 *Cranck*, 309) is in point, and destroys the title of the libellant. It settles the rule of decision for this Court, and is moreover in conformity with the early English authorities, (1 *Burr*, 467; 2 *D. & H* 587,) that an absolute bill of sale of chattels is itself a fraud, unless possession accompanies and follows the deed.

This conclusion of law cannot be displaced by evidence proving the *bona fides* of the transaction, and that possession remains with the grantor for justifiable purposes. This is asserted to be the rule of the common law, independent of the statute of frauds, (1 *Cranck*, 309,) unless, perhaps, an exception may exist in case the property is so situated that possession could not be taken of it at the time of its assignment. (1 *Peters' R.* 386.) The Court recognised a distinction between the sale of a chattel to take effect immediately and one to take effect at some future time, and assented to the doctrine of Buller, J., on that point, (2 *D. & H.* 587,) that possession of the chattel continuing with the vendor until such future time, or until the condition be performed, is consistent with the assignment; and con-

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plies with the rule that possession must accompany and follow the conveyance.

That distinction supplies no aid to the mortgagee in this case, because the assignment to him had immediate effect, and its operation was not to be deferred to a period *in futuro*. The conditional sales, which may be regarded valid without a change of possession, have reference to a conveyance upon a condition other than the repayment of money loaned. When it appears, either by express terms or plain implication, that the deed is intended only as a security for money, it cannot bar the rights of creditors or *bona fide* purchasers against the property. The doctrines applicable to conditional sales do not govern the case of a mortgage. (*Ryall v. Rolle*, 1 *Atkinson*, 165, 170, before Lord Chief Justice and Justice Chief Baron, and Burnet, Justice of Common Pleas, and Chief Justice Hardwicke, 17 *Vesey*, 196, note 1.) Even if conditional sales can stand under the statute of frauds on a different footing from absolute ones, the operation of those authorities cannot be restrained by a different rule in the Courts of this State, if the fluctuating decisions in the State Courts amount to the declaration of any different doctrine.

Many of the cases in which the validity of a mortgagee's title to vessels was denied, when possession was left with the mortgagor, arose under the English bankrupt law, (*Holt on Shipping*, p. 2, ch. 1, secs. 2, 3, 4,) but the decisions proceed on general principles, holding such possession to be fraudulent, and that the ownership of the vendor is not thereby divested, (2 *Kent*, 517,) and therefore apply with like force as if the question had been presented on the part of creditors at large, or purchasers.

The Schooner *Romp*.

Another feature in *De Wolf v. Harris*, which may have conduced to the conclusion adopted by the Court, is, that the controversy was between creditors upon debts existing antecedent to the assignment. Harris arrested the vessel to recover duties due the United States prior to the execution of the mortgage, so that the possession of the vessel by the mortgagor had in no way induced a credit to the fraud or prejudice of the United States, and the plaintiff had secured the position of the most diligent creditor.

Had the United States been *bona fide* purchasers of the ship for a full consideration actually advanced to the owner, who was in possession, the circumstances would not fail to have had an important influence, especially in respect to the relative equities of the litigating parties. The opinion delivered in the Court of Errors (26 *Wend.* 511) seems to rest the argument in favor of the paramount right of the mortgagee, without possession, on the ground that there was no reason to suppose the creditors opposing the mortgage had advanced their money on any credit given, because of the possession of the property by the mortgagor.

The case of the sloop *Mary* (1 *Paine*, 671, 677) bears directly upon the point, and determines that such mortgage interest shall not be allowed to prevail against a subsequent *bona fide* purchaser or incumbrancer, without notice. The contest was between an after bottomry creditor and a mortgagee, out of possession at the time the bottomry was given, (by the owner himself,) but who had acquired possession of the vessel under the mortgage before suit brought on the bottomry.

Judge Thompson decides to recognise such bottomry as superseding the antecedent incumbrance, and puts his

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decision "upon the principles of the common law, as well as of equity," that the first mortgage must be postponed to the second hypothecation, because the owner "was permitted to remain in possession, and to act as the absolute owner of the vessel; the register and all her papers standing in his name, and without any endorsement showing any incumbrance upon the vessel."

That statement exactly describes the condition of this vessel, and the conclusion drawn from it by the judge appositely applies here also;—the mortgagee "is therefore chargeable with negligence in permitting the mortgagor to appear as absolute owner, and thereby putting it in his power to impose upon a foreign creditor, who should advance money upon the security of the vessel."

The libellant must be presumed cognizant of the voyage contemplated by the schooner; and as she went to the charge of Knight & Co., at Havana, the previous and known agents of Brown, the owner, the presumption is conclusive that he was also apprised of that consignment.

He allowed her to go on that destination in possession of her papers, showing Brown to be owner, and without notice or qualification to the contrary, attached to them.

Brown's sale of the vessel at public auction for a valuable consideration, and to a purchaser ignorant of this circumstance, and who bought after seeing her papers, if not giving an absolute title of itself, must be regarded a laches on the part of the libellant, sufficient to prevent him setting up his mortgage priority as against such purchaser, or those *bona fide* deriving title through him.

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Although these considerations must defeat the title now brought forward by the libellant, yet the Court cannot overlook other features in the case operating against his action, the benefit of which the claimant may legally demand. The vessel was twice sold at public auction, and once at private sale; at each time, as it appeared on her papers, there was a full title vested in the vendor; and after a lapse of more than two years and a half, without questioning the validity of those sales, the libellant attempts to reclaim her under his secret incumbrance.

Had he an express hypothecation, even by bottomry upon her, such laches, accompanied with changes of ownership, would bar the enforcement of it against the vessel in the hands of purchasers so acquiring her. (*Blair v. The Ship Charles*, 4 Oranch, 328.)

The right of material men to pursue their lien against a vessel having changed ownership under similar circumstances, was denied in this Court several years since. (*The Utility*, MSS.*)

The excuse that the vessel had never before, within the knowledge of the libellant, been found where he could proceed against her, had it been proved, could not avail him, because, having entrusted the possession to her owner, without notice to others of his lien, he must, in the language of the Courts in like cases, be regarded as confiding in the integrity or solvency of the owner, and as having waived his incumbrance as against subsequent creditors or purchasers. (*Whittick v. Cane et al.*, 1 Paige 202.)

The case also calls upon the Court to notice, that the mortgage deed conveyed another vessel, and also real estate to secure the same debt.

* Since reported, 1 Blatch. & Hem. 212.

The Brig Napoleon.

It is a settled principle of equity that an incumbrancer upon various parcels of property must exhaust his remedy against that remaining with his debtor, before he resorts to those parts held by *bona fide* purchasers, or under junior incumbrances. (*N. Y. and Jersey Steamboat Co. v. Ferry Company*, 1 *Hopk.* 460; *Ripolene v. Stafford*, *Ibid.* 569; *Gouverneur v. Lynch*, 2 *Paige*, 300.)

The libel avers that the libellant has no resource for his debt other than to his security upon this vessel, yet he gives no proof that the other property embraced in the mortgage is not an adequate security, nor that it does not still remain in the ownership and possession of Brown.

The libel must be dismissed, with costs to be taxed.

THE BRIG NAPOLEON.

If, on the termination of a voyage, the master admits verbally that a balance of wages is due a mariner, and when sued therefor alleges, in his answer, that he has paid the amount in full to him, it devolves upon the respondent to prove the payment.

When there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to the credit of them on both sides, the balance of evidence will be regarded as in favor of the party having the greatest number. The federal Courts have jurisdiction of actions for wages for services on board foreign vessels.

These actions will be entertained of right in behalf of American seamen against foreign vessels, owners or masters; and will also be readily sustained in behalf of foreign seamen against masters or owners of foreign vessels, when the voyage terminates or is broken up in an American port, or foreign seamen are discharged from a foreign ship there, and are necessitous. But the Courts are unwilling, under other circumstances, to support such actions, and discourage their prosecution in our tribunals.

An allegation in the answer that all the parties are foreigners, and the ship is foreign property, must be proved by the respondent or claimant.

The Brig Napoleon.

THE libellant sues in a summary action for wages earned on board the brig Napoleon, on a voyage from New-York to Jamaica and back, and avers that he is an American seaman, and was discharged on the arrival of the vessel at this port, September 5th, without payment of his wages. The answer asserts that the vessel is a British bottom, owned at the port of St. Johns, New-Brunswick, and excepts to the jurisdiction of this Court over the subject matter.

It admits the shipping and services of the libellant as charged by him, and that the vessel returned to the port of New-York or on about the 3d day of September last, and avers that the libellant "was then paid off and discharged, the voyage being ended."

The answer reiterates, in the form of denial, the same allegation, asserting that the libellant was not discharged without having been first paid the wages due him, "but on the contrary thereof, the fact was that he, at the time of his discharge, received from the respondent the full amount of wages due him," &c., and proceeds to state in detail the manner and amount of payment.

The libellant filed a general replication to the answer, and both parties put in their proofs under the issue. Four witnesses, two on each side, were examined before a commissioner, and their depositions have been read, and three others have been examined orally in Court.

BETTS, J.—There is no direct proof of the discharge of the libellant, but it appears that he left the vessel on her arrival here; and no objection being shown to his so doing, although he was repeatedly afterwards at the vessel, it must be taken as admitted by the answer, that

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he was discharged on the 3d or 4th of September, the day the vessel came up to the city from quarantine. The mate deposes that the libellant's wages were paid him in full by the captain in the afternoon of Monday, the 8th of September, in the cabin of the vessel, the mate and captain's wife being also present. Collateral facts in proof fix this to have been the time when the libellant carried a pitcher of water into the cabin at the request of the mate.

The mate testifies he did not pay the money himself, nor have it in his hands. That the captain took a twenty dollar bill out of his pocket-book, laid it on the table, and then handed it to the libellant. The mate had made up the libellant's account of wages, and found there was due him twenty dollars, deducting payments he had previously received. The whole wages in arrear at the time amounted to about twenty-two dollars. The respondent, before this action was brought, tendered the libellant two dollars in specie, and the tender not being accepted, paid the sum into Court, setting up the tender in his answer.

Daniel Dwyer, a seaman on board, deposes that the libellant told him, a day or two after that Monday, that he had received all his wages of the captain, except about a dollar and a half, which he was trying to obtain.

This representation is contradicted by the libellant's proofs.

A clerk in the office of J. W. Hallett, Esq., testifies that the libellant came to the office to have his demand collected. On Thursday, the 11th September, he left his account for \$22, and the same day notice was sent the respondent from the office advising him thereof, and requesting payment of that sum.

The Brig Napoleon.

That the master came to the office the same day, accompanied by his mate, and brought the note with him. He said the wages had been paid the libellant in full the Saturday previous, in the afternoon, towards evening; that he did not pay the money himself, but it was paid by his mate. The mate said nothing. He was directly alongside the master at the time that statement was made.

The Saturday after (13th) the master came again to the office, and then said that the libellant had come to the vessel Monday morning (8th) for his wages, and he himself then paid him in full.

The answer was sworn to by the master on the 17th September, six days after the statements made at Mr. Hallett's office, in the presence of the mate, and to which the assent of the mate must be implied; and the discrepancy between the answer and the declarations made by the captain, and the after testimony of the mate, is of a character to excite strong suspicions against the integrity of these parties.

The answer avers, in positive terms, that the vessel arrived here on or about the 3d of September, "when the libellant was paid off and discharged, the voyage being ended;" and to demonstrate that his attention was fixed to this connection of facts, and that he meant to make it emphatic, in the next article of his answer he repels, by a positive denial, an assertion in the libel, sworn to the 15th September, "that he (libellant) had been discharged out of and from the services of said vessel, without being paid the balance of wages due him, &c., amounting to twenty dollars and upwards," and avers the fact to be, on the contrary, that the libellant, at the time of his discharge, received from the respondent the full amount of his wages.

The Brig Napoleon.

The main fact stated, that the wages had been paid before suit brought, would be sufficient, if proved, to bar the action, although the time or place of payment might not correspond with the allegations of the answer, and the Court would not regard such variations as material.

But these particulars become of significant importance towards determining between conflicting proofs, whether the alleged payment was ever made.

Three witnesses for the libellant testify that they went with him to the vessel the 8th of September, to procure his wages; it was the Monday afternoon referred to by the mate. They identify the time, as he does, by the circumstance of the pitcher of water brought by the libellant to the cabin.

All these witnesses swear that neither the captain or mate were present in the cabin with the libellant at that time, and that he merely carried the pitcher of water there, and came immediately out. The master and his wife were on deck. The mate was there, also, with a book in his hand; and it appears, from other evidence, the vessel was at the time discharging cargo.

The witnesses all saw the libellant go up to the master and address him, as if making some inquiry, and two of them, Joyce and Young, testify that they were standing near him, and heard him ask the master if he would settle with him or pay his wages; and the master replied he would pay him as soon as the cargo was discharged or out; and all the witnesses swear that no money was paid him that day by the master. These two witnesses state further that they went again with the libellant to the vessel on Tuesday and Wednesday following that day. Both assert that the master was not

The Brig Napoleon.

on board on Tuesday, and say that the libellant asked the mate when the master would pay his wages, and the mate replied he would not pay them until the cargo was out. Young says the mate made the like answer to the same inquiry on Wednesday, the master not being on board; but Joyce says it was the master, and not the mate, who made that answer on Wednesday.

Three witnesses, Joyce, Peterson and Young, all swear that Daniel Dwyer came to the libellant's boarding-house on Sunday, (the 14th,) and inquired for the libellant, and then asked him if he had got his wages from the master. The libellant replied he had not. Dwyer then told him that he would not get them without suing the master, and if he (Dwyer) had his things ashore, he would not go in the vessel.

Upon the main fact of payment the two classes of witnesses stand in direct and positive contradiction with each other, and under circumstances which admit of no ground for supposing there is with them any mistake or forgetfulness in the matter. On the one side or the other, there is unequivocal perjury.

In considering the evidence to determine how the credibility preponderates upon that issue, the Court cannot overlook the incongruity, in some collateral particulars stated by the libellant's witnesses. Nor under circumstances awakening distrust as to the integrity and motives of the witnesses on each side, can it escape notice that the libellant and his witnesses are colored people, all lodging together, and that the keeper of this boarding-house has this suit chiefly under his own management and direction, and undoubtedly is to receive its proceeds. These circumstances afford color for suspicion of connivance between these parties, or at

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least that these witnesses have been brought to the stand strongly prepossessed for the libellant, and very much under the influence of their boarding-house keeper.

These considerations would probably deserve weight beyond that of mere suspicion had the defence set up on the part of the respondent been ingenuous and consistent. The Court might then feel compelled to disregard the fact of a greater number of witnesses on the part of the libellant, and decree conformably to the direct and positive testimony of the mate, corroborated by that of Dwyer, as to the admissions and declarations of the libellant.

But the glaring discrepancy between the answer and the proofs, the confused and contradictory declarations of the master, in Mr. Hallett's office, the mate being present, and apparently assenting to the statements made by the master, and then testifying to one in direct opposition to them, in my judgment, tend to depreciate the reliability of the defence quite as much as the disparaging circumstances bearing against the credibility of the libellant's witnesses do against the justness of the action.

In this confused and conflicting state of the testimony, the numerical superiority of witnesses with the libellant ought to be regarded as at least neutralising the evidence of the respondent on this defence of payment. That the wages demanded had been earned, and were due to the libellant on the arrival of the vessel at this port, is admitted in substance by the answer. It devolves upon the respondent to discharge himself from that debt.

The state of the pleading, as well as nature of the defence, casts the burthen of proving such satisfac-

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tion upon the respondent. It is always with the party who offers an affirmative fact in support of his case. (*Phelps v. Hartwell*, 1 *Mass. R.* 71; *Buckminster v. Perry*, 4 *Mass. R.* 593.) An answer alleging payment is of that character; it places the burthen of proof upon the respondent. The respondent is bound to maintain the allegation by evidence clearly and satisfactorily overbalancing that of the demandant. It is not enough to do that for him to make out a probable case in his favor; he must render it reasonably certain.

Under this feature of the case, I shall decree that the libellant recover the wages claimed, together with summary costs, to be taxed. The two dollars deposited in Court by the respondent is to be applied in part payment upon this decree.

The exception taken to the jurisdiction of the Court because of the foreign character of the vessel and her master, cannot prevail. It has not been proved that the libellant is an alien; and were it so, the law affords no exemption of foreigners or their vessels from the jurisdiction of this Court.

Nor if both parties were aliens would that fact affect the power of the Court; it has cognizance of the subject matter, although, as a general usage, it forbears exercising its jurisdiction over controversies between foreign seamen and shipmasters. But it is no way probable it would withhold it in such case, when the suit is for wages by a seaman who had completed his contract and voyage, and was discharged from his vessel. Nor would its jurisdiction be denied in case the voyage was broken up in an American port, leaving the crew in a necessitous condition, with outstanding wages due them.

Decree for the libellant.

Nash & Manchester, for libellant.

P. Hamilton for claimant.

The Ship Philadelphia.

THE SHIP PHILADELPHIA.

A seaman leaving a ship at a foreign port during her voyage, with or without leave, and not returning within a reasonable time before another man is hired in his place, forfeits the wages then due him.

If he abandons the ship by consent of the master, such mutual agreement annuls the shipping contract between them, and the seaman cannot afterwards reclaim his place on board the ship. The master may be subject to penalties or the ship to a charge of extra wages, by positive law, for abandoning or leaving a seaman in a foreign port, but this does not reinstate the shipping contract.

After a mariner has voluntarily left his vessel in a foreign port without leave of the officer in command, and his place has been supplied by another, he cannot acquire a right to be reinstated and to wages, by coming clandestinely on board, and remaining concealed from her officers until she is out at sea.

The master, under such circumstances, is authorized to compel him to work his passage whilst he continues with the ship, and no engagement to pay him wages can be implied therefrom.

When a seaman receives payment for wages during an outward voyage apparently equal to, and rather exceeding the amount due, and afterwards, without demanding further payment, voluntarily leaves the vessel, and on her return to her home port brings suit against her for wages for the full voyage, the Court will not order a reference to compute the exact state of his claim when he abandoned the vessel, but will dismiss the libel, with costs, against him.

THIS libel was filed *in rem* for the recovery of wages. It alleges that the libellant shipped at New-York, on board the ship Philadelphia, to perform a voyage to Hamburgh and back to New-York, at \$15 per month. That he entered into her service the 2d day of May, 1845, and continued on board until after arrival at Hamburgh and her return to New-York.

The defence in the cause offered by the respondent was, that the libellant deserted the ship during the voyage, and was never afterwards received into her service, and that all right to wages, if any were due, was thereby forfeited.

The Ship Philadelphia.

On the 24th June the libellant left the ship to avoid, as he asserted, being arrested by the police of Hamburg, for a previous desertion from a Russian vessel. Two of the seamen testified that he asked leave of the mate to go ashore, and that the mate gave him leave, directing him to be sure to come back again; and that libellant engaged to come on board, if not before, when the vessel went down the river to Coxaven. The mate testified that he never gave the libellant permission to go ashore; that he left the ship in the absence of the master, and without leave of him, the mate. Proof of the declarations of the libellant also were given to corroborate the mate's testimony. The mate further testified that he entered the name of the libellant the day he left the ship, on a slate, (the log-book being on shore,) as absent without leave; and when the log-book was brought back to the vessel, he transcribed into it the entry made on the slate. The log-book having that entry in it was offered in evidence to prove the desertion of the libellant, and was objected to as incompetent evidence. It further appeared that the libellant got on board the ship in Coxaven harbor, in the night of the 5th July, without the knowledge of any of the officers, and secreted himself there; and after the ship had got under way, and was twenty-five miles at sea, he made his appearance on deck, and that was the first knowledge the officers had of his being in the ship.

One of the seamen testified that he met the libellant in Hamburg some days after he left the vessel, and at his request, told the master the libellant would join the ship again at Hamburg, or down the river, and wished his clothes should not be sent ashore. The steward swore he was present at that conversation, and the mas-

The Brig Napoleon.

It is a settled principle of equity that an incumbrancer upon various parcels of property must exhaust his remedy against that remaining with his debtor, before he resorts to those parts held by *bona fide* purchasers, or under junior incumbrances. (*N. Y. and Jersey Steamboat Co. v. Ferry Company*, 1 *Hopk.* 460; *Ripolene v. Stafford*, *Ibid.* 569; *Gouverneur v. Lynch*, 2 *Paige*, 300.)

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THE BRIG NAPOLEON.

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The Brig Napoleon.

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BETTS, J.—There is no direct proof of the discharge of the libellant, but it appears that he left the vessel on her arrival here; and no objection being shown to his so doing, although he was repeatedly afterwards at the vessel, it must be taken as admitted by the answer, that

The Ship Philadelphia.

him ; his case would have stood upon an entirely different footing from that of a deserter returning penitently to the ship, and proposing a submission to her authority, or that of a wrong-doer, who had been expelled the ship by the master for misconduct on board. In either of these cases, the law, upon the subsequent and full submission of the seaman, may interpose, and exact from the master a condonation of the offence, and a restoration of the seaman to his place in the ship. (*Curtis' Rights of Seamen*, 150.)

The master may also, by positive law, be subject to damages or penalties for leaving a seaman abroad, or even discharging him by his consent ; (*Act Feb. 28, 1803, § 3 ; Abbott, 147, and notes ;*) but that liability rests on other grounds than that the contract still subsists between the mariner and the ship. The principle and purpose of the rule is to control the punitive power of the master in relation to the misconduct or negligence of seamen, and to coerce the exercise by him of the pardoning power in cases equitably and fairly entitled to claim it, and with a leniency and liberality adapted to the dispositions and capacities of seamen, as well as the quality and effect of their wrongful conduct towards the ship. (*Whitton v. The Commerce*, 1 *Peters' Adr. Dec.* 160 ; *Abbott, 147, and notes.*)

What the libellant could not secure to himself by an open offer to return to the vessel, he cannot effect surreptitiously. His entry clandestinely on board, and secreting himself there without the knowledge of the master, does not restore him again to the service of the ship, and entitle him to demand the place and privileges of one of the crew. His desertion from the ship, or agreement with the master to leave her, annulled the

The Ship Philadelphia.

contract he had made with her owners, and a new engagement would be necessary to clothe him with any rights against the vessel for after services on board.

Those rights result from contract, express or implied, and the mere rendition of services under circumstances negating the idea that they were voluntarily accepted by the master, or with a view to the benefit of the ship, will lay no foundation for a claim of compensation against her or the master. The evidence is clear that the master ordered the libellant to work his passage, in order to indemnify the owners for the expense imposed upon the ship by his unauthorized and unjustifiable intrusion on board. The ship was out at sea when he exhibited himself to the master, and could not then be freed from him. The master could rightfully have enforced this service upon him without his consent; but I think there is sufficient evidence that the libellant freely agreed to comply with that order. He was told his place was supplied by another, that his services were not wanted, and that his clothes and effects were sent ashore at Hamburgh. He replied he did not ask for them, and only wanted a passage to New-York. This sufficiently establishes the consent of the libellant to do duty on board in satisfaction of his passage, and not in the character of one of the ship's crew.

He had received, as it appears, in pay and hospital money, when he left the ship, \$26 80, and his wages on the outward voyage amounted to only \$26 50. On this statement of the account he had been already overpaid. In this point of view there would be nothing for the forfeiture to act upon beyond the contract, if he is held to have incurred one.

A more exact computation may possibly show there

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was still a balance in his favor, but as no such balance was claimed at the time by him, I do not consider it advisable to send the case to a commissioner on that inquiry, as, independent of the right of forfeiture, the claimant would more than extinguish the balance, if any is found due, by the costs to be decreed against the libellant. I shall, therefore, order the libel dismissed, with costs.

THE BRIG HARRIET.

Courts of law, as a general rule, require affidavits to the merits of a cause to be made by the parties to the action, where a question of diligence or good faith is involved, but the rule is not inflexible, and the deposition of the attorney, upon good cause being shown, is sufficient.

The strict rules of the common law are not applicable to Admiralty practice.

The proctor is, in many cases in point of fact, *dominus litis*, clothed with all the authority of the party himself.

Without regard to that distinction, Courts proceeding according to the civil law, admit proctors to exercise all the functions of attorneys at law.

Pritchard, for the claimant.

Mulock, for the libellant.

BETTS, J.—A motion has been made in this case, that the libellant be required to file additional security for costs. It was opposed, upon the ground that the affidavit upon which the motion is based is made by the proctor in the cause, and not by the claimant, whom he represents.

The courts of law, as a general rule, require affidavits to the merits of a cause, and in those instances, where the diligence and good faith of a party are in question, to be made by the party himself. Still the rule in those cases is not inflexible, for the deposition of an attorney or other person, may be substituted, when good cause is shown for the change. (*Williams v. Magill*, 1 *H. Blackstone*, 637; *Peake's N. P.* 97; *Geib v. Icard*, 11 *Johnson R.* 82; *Roosevelt v. Dale*, 2 *Cowen*, 581; *Chase v. Edward & Bull*, 2 *Wend.* 283.)

In strictness, the principle upon which the affidavit of the actual party is demanded would scarcely apply to proceedings in Admiralty Courts, as the proctor there, for many purposes, is in fact *dominus litis*, clothed with all the authority, and bearing the responsibilities of the party himself. (*Clerke's Praxis*, tit. 7; *Ib.* 48; *Ib.* 51; *Betts' Pr.* 10.)

Although, by the rules of this Court, its practice is assimilated to that of the Supreme Court of the State upon questions which it has not specifically provided for, yet that would not change essentially the features of Admiralty practice, when variant from that of the common law.

But I think, in this case, it is in consonance with the established course of law Courts to allow affidavits, on motions incidental to a cause, and when the facts cannot be supposed to rest peculiarly in the knowledge of the party, to be made by attorneys and proctors. (2 *Wend.* 283.)

This is the invariable course in Courts proceeding according to the civil law, the source of the Admiralty practice, without reference to any special functions of

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a proctor differing from a mere attorney. (*Caulker v. Banks*, 3 *Martin N. S. (Lou.)* 543.)

The motion is accordingly granted.

GRAHAM *et al.* v. HOSKINS.

The testimony of the libellants themselves in an action *in rem*, the one for the other, although legally admissible, ought to be narrowly scrutinized and received with caution.

Courts of a foreign power will take cognizance of the claims of seamen for their wages, only in cases of flagrant wrong or suffering on their part, but not upon an alleged breach of contract, much less to decide upon a *quantum meruit*. They should seek redress from their own consul.

Services rendered on board a ship while at the dock in Liverpool, does not give to the demand for wages a maritime character, of which an Admiralty Court can take cognizance.

This is an action *in personam* against the master of the steamship Great Britain, a British vessel, to recover wages for services by the libellants on board that ship from New-York to Liverpool and back to New-York.

The libel alleges that the libellants are mariners and firemen by trade and profession, and that they shipped, on the 30th of August last, on board the Great Britain, as firemen, to perform the voyage aforesaid, at the rate of £4 sterling each per month; that they continued with the vessel, performing services until her return to this port, when they were both discharged, leaving due to Graham \$20 and upwards, and to Currie \$14 and upwards, which the master refuses to pay.

The answer denies the agreement set up by the libellants, and avers that Currie alone hired on board the

ship from the port of New-York to Liverpool, and at the rate of £4 per month wages, and that Graham was received on board, with the privilege to work his passage out to Liverpool without pay.

It further denies that the libellants did duty on board as they allege; and charges that Currie having received an injury in Liverpool upon his discharge from the ship, was admitted on board at his urgent request, to be brought back to this port; and that he was unable to do duty during the return voyage; that after Graham had been discharged at Liverpool, he earnestly solicited to be permitted to come on board and work his passage back to New-York, and was so received; but that on the voyage back he refused to do such reasonable duty as was required of him, and denies that any wages are due to either libellant.

The answer admits the charge in the libel that no written or printed agreement was signed by the libellants, but avers that the ship is a British vessel, and denies the jurisdiction of this Court over the subject matter.

BETTS, J.—The two points of law presented by the pleadings, and one of which was the position most strongly urged on the hearing, I shall pass over as not necessary to be decided in this case.

For, first, if the libellants could establish their position, that foreign vessels come within the act of Congress of July 20, 1790, requiring the masters of vessels on foreign voyages to enter into written or printed articles with their seamen, or else to pay them the highest wages allowed at the port of shipment within the preceding three months; or if the jurisdiction of

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the Court is unquestionable, neither point decided in the affirmative would aid the libellants, because they fail to prove any ground of claim to wages in the case.

The only testimony offered by the libellants in support of their claims is that of each libellant, swearing for his co-libellant.

This species of evidence, though legally admissible in actions *in rem* by seamen for wages, is always admitted with great caution, and necessarily with very considerable distrust. The temptation to indulge in strong statements in their own favor is exceedingly pressing, and the inducement operating upon the mind of each witness from his personal interest in the subject matter of the suit, is enough to put to the severest test the veracity of suitors. For the persuasion is constantly before their minds, that the testimony they are giving will, to a greater or less degree, influence the judgment which is to be pronounced upon their own case.

It is by no means clear, that when seamen unite in actions *in personam*, they are not subject to the common law rules, applicable to joint parties, or if they are permitted to sue for and recover on distinct and independent claims, that they should then be competent witnesses, each for the other, in such actions.

Waiving this matter, however, as an objection not raised on the part of the respondent, and receiving the evidence of the parties as legally admissible, it does not establish any contract of hiring made with them by the respondent, or any agent of the vessel.

They did not ship the same day, and were not together when the bargain was made upon the subject.

Currie testifies that Graham was on board and did

duty as a fireman, and was to have £4 per month, but he does not state any person with whom the agreement was made.

Graham states that he saw Currie's name on the chief engineer's book for £4 per month, but does not know what he agreed to take; heard the chief engineer say that they were to have £4 per month.

This testimony is clearly insufficient to make out the case set up by the libellants. It does not appear but that these men are British seamen, and residents of Great Britain, nor that they were discharged at the instance of the respondents, without being permitted to return with the vessel to her home port. If they were so discharged, their proper course would be to seek redress from their own consul. Courts of a foreign power would take cognizance of their claim to wages only in case of flagrant wrong or suffering on their part, but not upon the ground of a breach of contract, much less to decide upon a *quantum meruit* for services rendered in a British vessel.

The case upon the libellants' own showing would not, therefore, justify a decree in their favor, while the evidence of the respondent clearly shows that there is no color of equity in their demand.

Clements, the chief engineer, says, that Currie applied to him to be shipped as a fireman to Liverpool, where he was to be discharged, and he was so hired and paid in full, and discharged on the arrival there of the ship. Graham solicited a passage out to Liverpool, with the privilege of working his passage. He was received on that request, but a fireman becoming disabled on the passage, the engineer put Graham in his place, and allowed him his wages subsequently. He was paid off

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in full, and discharged upon the arrival of the vessel at Liverpool.

Afterward both men were employed on board by the chief engineer, who hired them as day laborers, in port, to work in the engine-room.

Currie received an injury by a fall on the morning the ship was to sail from Liverpool, and after that solicited, as an act of charity, to be brought back to New-York in the ship, and the respondent consented thereto, and he was so brought back, and attended by the surgeon of the ship, free of expense, not being able to do any duty.

Graham, the day previous to the ship's leaving England, also applied for leave to work his passage back to the United States, to which the respondent consented, and he was received on board upon those terms.

This evidence being uncontradicted in any particular, is conclusive upon the merits of the cause. It takes away all ground of an implied assumpsit to pay these men at the same rate as on the outward voyage, and clearly establishes an agreement to bring them back without wages, the one being a disabled seaman, and the other willing to give his services in compensation for his passage.

If there remains any thing due to them for their labor on board the ship at the dock in Liverpool, it is not in respect to them, a demand of a maritime character, of which this Court can take cognizance, so that under any aspect of the case, upon the evidence before me, the libellants have totally failed to make out such a case as would entitle them to a decree in their favor. Their libel must be accordingly dismissed, with costs.

A. Nash, for libellant.

G. B. Butler, for respondent.

THE SHIP HARRIET.

Where no materials are furnished or labor bestowed in the refitment or reparation of vessels, services, which are entitled to take the rank and character of maritime, are such as are performed in aid of the ship's company, or the navigation of the vessel, and are rendered while she is afloat upon tide waters. A watchman employed on board a domestic vessel, is, under the State law, entitled to a lien upon her for his services, provided they amount to over fifty dollars, and he may sue therefor in his own name in Admiralty.

BETTS, J.—This was a suit to enforce a lien for wages under the State law, as a watch and keeper in charge of the above ship, a domestic vessel, whilst she was lying at the wharf in New-York; and the libel alleges that more than \$50 is due therefor.

The claimants filed a demurrer in the cause, pleading to the jurisdiction of the Court, on the ground that the demand is not of a maritime character, and cognizable in Admiralty.

It is conceded that the libellant is a mere laborer on shore, not a mariner, and in no way attached to the ship, except sleeping on board nights, and watching her during the day, and that she was moored at the wharf in a dismantled state.

I think, upon the statement of the case, those services are not of a character which would, by the maritime law, create a lien or privilege to the libellant against the ship.

When no materials are furnished or labor bestowed in the refitment or reparation of vessels, services which are entitled to take the rank and character of maritime, must be such as are performed in aid of the navigation of

The Ship Harriet.

the vessel or the ship's company, or in furtherance of her appropriate business, and are rendered whilst she is employed afloat upon tide waters.

. The privilege has never been extended to draymen, who take her cargo to a vessel, or remove it from her, or to stevedores, who stow it, or discharge it, for the reason that men so engaged on domestic vessels are merely laborers, employed essentially in services distinct and different from navigating, or aiding to navigate or benefit the vessel or crew in actual employment.

It is unnecessary to inquire what rule would be rightfully applied, when the vessel is a foreign one, or a keeper is employed on her in the stream, and away from a dock or wharf.

But it is urged if that objection prevails, the libellant is still entitled to this remedy, the lien being given him by the local law, and that this Court will secure him the benefit of it whether the claim has the character of maritime or not. The statute of the State renders every debt over \$50 "contracted on account of the wharfage, and the expenses of keeping such vessel (any ship or vessel within the State) in port, including the expense incurred in employing persons to watch her, a lien upon the vessel, her tackle, apparel and furniture." (2 R. S. 405, § 1, *art.* 3.)

For the claimants it is contended that the statute has reference to such debts only as are contracted for wharfage, or keeping the vessel, in which a watchman's expense are included, and that no debt arises against the vessel as to such keeper or watchman, independent of wharfage.

I am satisfied this is not the true construction of the act. The controlling and principal object and purpose

of the law is to supply security to those who actually benefit vessels in the way pointed out by the statute, and it strikes me that a construction, which would provide a security for those who do not perform the service, and deny it to those who do, would be incongruous in the extreme.

The phraseology of the law is somewhat indirect, but by affording a protection, by way of a lien, to those who incur expenses in employing persons to watch a vessel, the legislature palpably regarded the service of watching as the meritorious ground of the lien, and intended its advantages should accrue to whoever supplied that benefit to the vessel. If a wharfinger puts on board a watch, and pays him, those expenses come under the protection of the lien, and only so for the reason, that by such payment he became equitably subrogated to the rights of the man who rendered the service. The privilege created by the act must be considered intended for the service of watching, although so expressed as to embrace also the person who, it might be supposed, would naturally incur the expense of employing the watch. It is conceded that the wharfinger could maintain an action here for this demand, and in my opinion the libellant may proceed in his own name, and enforce in this Court his remedy under the statute, provided his claim is proved to exceed \$50. (4 *Wheat.* 438; 1 *Paine*, 620.)

Decree for the libellant and against the demurrer, with the usual liberty to the claimants to plead over.

W. Mulock, for libellant.

W. M. Prichard, for claimants.

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THE SCHOONER EAGLE.

Without the aid of an express stipulation, a seaman cannot sue for wages earned on a foreign voyage, until the full completion of that voyage, by the unloading of the cargo or ballast.

Quere. Whether an appeal to the judge lies from an order of a commissioner or justice of the peace, granting certificates of cause for Admiralty process, under the act of 1790! But the judge, or Court may stay proceedings, or act upon the petition *de novo*.

If the master or owner defers, beyond a reasonable time, to unload the vessel, such laches may be regarded as equivalent to a discharge of the seamen.

The burthen of proof to show a discharge before the unloading of the cargo, rests upon the seaman. His own oath is not sufficient evidence.

Under the act of Congress of July 20, 1790, the seaman cannot sue until ten days after the discharge of the cargo have elapsed, unless there be a dispute between the master and mariners touching the wages.

The act of 1840, in regard to the encumbrances in shipping articles, applies to alterations which would vary their effect in respect to seamen. Immaterial encumbrances will be disregarded.

BETTS, J.—This was an appeal from the decision of a commissioner granting certificate of probable cause for process of attachment against the vessel for recovery of wages, pursuant to the act of Congress of July 20, 1790. The schooner arrived at this port on the afternoon of December 24th, and the libellant, cook of the vessel, on the 26th, two days following, presented his affidavit and application to a commissioner, and procured a summons to be served upon the vessel, to show cause why Admiralty process should not issue against her therefor.

The affidavit stated that the libellant shipped as cook on the 30th day of October last, for a voyage from New-York to Baracao, (Cuba;) that he did duty on board until the 25th of December, when he was

discharged out of the vessel by the master, leaving a balance of \$15 and upwards due him for wages.

On the return day of the summons, and in opposition to the grant of process, the mate was examined, and swore that the cargo was not out of the vessel, that the hatches were first opened that day, (the 27th,) that the cook left the vessel after she was made fast, and all the men went ashore that night, and also the night of the 25th, and did not return to work the day after. He further stated, that a stevedore was employed to unlade the cargo, who commenced on the 27th, and that the libellant had never been discharged from the vessel.

One of the seamen testified that he had not been called upon by the officers to assist in unlading the cargo.

The libellant called for the shipping articles, and on the production of a copy certified by the custom-house, the name of one man appeared to be erased therefrom.

The objections urged before the commissioner, and pressed here as grounds for appeal, are that the period appointed by the act of Congress of July 20, 1790, had not expired, so that the seaman had a right to attach the vessel; and that the affidavit of the prosecuting seaman was incompetent evidence upon which to found a certificate.

For the libellant it was argued, that the seaman having sworn to facts, authorizing the proceedings to be instituted, it was incumbent on the master to deny these facts under oath; that the discharge of the seaman was to be implied from the employment of stevedores to unlade the cargo; and that an erasure appears upon the shipping articles, which, under the act of 1840, relieves the seaman from the obligation of remaining

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upon the vessel; that the libellant had accordingly the right to leave at his option, and sue for his wages.

As this is the first case which has arisen before me where these questions have been raised, and where a party claims the right to cause an immediate arrest of a vessel on her arrival in port, without proof she was to depart within ten days, I have thought proper to consider them specifically, and present my view of the law arising upon these matters. The competency of the Court to entertain an appeal from proceedings before a commissioner, has not been made a question by either party. It is exceedingly doubtful at best, whether the Court has any jurisdiction of that kind; but an order to stay proceedings may be made, or the subject may be deemed originally before me; and as all the proofs have been presented and acted upon by both parties, without exception to the appeal, I am disposed to consider and determine the case the same as if the petition had been presented here in the first instance.

The act of July 20, 1790, § 6, provides, "That as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and that if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, to summon the master of said vessel or ship to appear and show cause why process should not issue against said vessel," &c.

The statute determines the time at which wages become due in all cases of hiring, when the precise time

is not fixed by the parties, that is, on the full discharge of the cargo at the last port of delivery. The time the wages become payable is the subject of distinct regulations. The seaman has no right to proceed in Court, the judge has no authority to entertain his claim until the period so fixed has expired, or other contingencies referred to have occurred. Without the aid of an express stipulation, a seaman cannot, accordingly, sue for wages earned on a foreign voyage, until the full completion of the voyage, by the unloading of the cargo or ballast.

If the master or owner wrongfully defers beyond a reasonable time to unload the vessel, such conduct will, in respect to the crew, be tantamount to her discharge. The purpose of the law cannot thus be evaded, and the seamen be defrauded of their wages or hindered in their recovery.

The express contract of the libellant in this case, "to discharge the cargo," is no extension of his liability under a general shipping agreement, and the cargo being unlivered without fault of the ship, the voyage, in respect to the crew, is no more ended than it was before the vessel was safely moored in port, unless the mariner can show himself absolved from the restrictions imposed upon him by the act of Congress, and in this case, also, embodied in the agreement. A plain, distinct discharge of a seaman by the master or officer in command of the vessel, if he chooses to accept it, terminates the contract, and he is then regarded as having fulfilled it on his part, at least as to the period of service. Such discharge from the ship is alleged by the libellant in this case, and it rests upon him to make out the fact,

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in order to acquire a standing in Court, on his demand.

- He contends that he has established it in this case, first, directly by his own affidavit, and secondly, by implication or presumption, inasmuch as the men were not required to go to work unloading cargo, and further, that the master has not, by his own oath, denied the allegations sworn to by the libellant.

This affidavit, like a libel, may be sufficient to authorize supporting proofs in the first instance, or to furnish ground for an order against parties omitting to appear or show cause; but upon a contestation in Court, neither becomes proof in favor of the action, nor do they when the owner comes in on summons, and gives evidence counterbalancing or conflicting with the affidavit of the petitioner. He then, in common with other litigant parties, is compelled to meet such contradictory evidence, and support his application by legal testimony, on his part. His own oath cannot avail him to accomplish this object. (*The Crusader*, Ware, 438; *The Lord Hobart*, 2 Dods. 101.)

Here the evidence was full to show that the contract entered into had not been fulfilled, and accordingly that the seaman had no right to demand his wages and attach the vessel, upon the allegation that the voyage was completed. The mate, who was in command when the libellant went ashore, also testifies that the libellant was not discharged.

It would be changing all the principles of evidence to permit a party, by his own *ex parte* oath, to displace a defence by disinterested witnesses, and entitle himself to an award of an attachment and arrest of the vessel.

No fact is established by the proofs which af-

fords reasonable color for an inference that the men were released from the duty of discharging the cargo. One of them testifies that he did not assist in it, and the mate proves that stevedores were employed in unloading, on the 27th, the third day after the vessel arrived, and also says the crew were not at the vessel that day, or the 26th; they all went ashore on Christmas day. It is not even proved that the residue of the crew have been paid by the owners, or their omission to perform the service been assented to or acquiesced in.

If the libellant had proved that the master was not interested in the case, the omission of the owners to call him as a witness might be calculated to induce a belief that he had directed or assented to the discharge of the libellant; still, as the owners were not bound to examine him, their not doing so cannot amount to a legal implication that he did discharge the petitioner, nor can the Court impute fault to them for not calling in his testimony. It must, moreover, be observed, the master was a competent witness for the libellant, and as he avers that he was discharged by that officer, it was incumbent upon him to confirm that most material allegation.

It is to be remarked, that unless such discharge is proved, the fact that the voyage is completed with the unlivery of cargo, does not entitle the seaman to sue for wages "until ten days more have elapsed," unless a dispute arises between the master and mariner, "touching the wages."

It is not shown that any such dispute has arisen in this case; the only defensive allegation before the Court is, that the contract is not yet fulfilled, and wages

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are not payable. The contestation of this point does not fall within this provision, for it relates to the proceedings of the seaman after his contract is performed, and his right to wages has become perfected, and the ordinary delay given by the statute, probably to enable the master to collect freights, is taken away when he disputes the right of the seaman to wages at all.

I cannot perceive, therefore, that the act of July 20, 1790, removes the impediment or supplies the authority for this proceeding. The libellant, however, further insists that he is liberated from the vessel and the restrictions of the act of 1790, by the provisions of the act of 1840, because of an erasure made upon the shipping articles.

The duplicate articles and list of the crew of the vessel, appears to be a fair copy, with the usual custom-house authentication, and has nothing exceptionable or suspicious on its face, unless it be that the name of one individual inserted originally is erased, with the note "*run*" against it. Every thing else, except the custom-house certificate, is written in one and a uniform hand. The 4th subdivision of the act of 1840 prescribes the consequences of erasures in shipping articles; "they shall be deemed fraudulent alterations, working no change in such papers, unless explained," &c.

There is nothing conducing to show that this alteration, if added to the duplicate or is found in the original, affects the libellant, or any provision in the contract. It had relation to a man shipped as cook, who abandoned the vessel, and whose place, it is alleged, was supplied by the libellant.

But apply the whole effect of the law to this change, and what would it amount to? No obligation or pri-

vilege of the crew is touched by it. The line, if restored, would only add the name of some man to the list and remove the word "run," now opposite to it. This would not in any manner lessen or enlarge the stipulations of the contract, or reach the interests of those who signed the shipping articles.

The policy of the act is most obvious. It is manifestly to prevent any alterations of shipping articles, which work a change in respect to the rights of seamen. Accordingly the custom-house copy is to be taken as the authentic and true agreement, and variations made in a different handwriting are declared by the law presumptively fraudulent; and accordingly, before they can affect the rights of any one, must be satisfactorily explained to the Court.

This law has relation to a condition of the papers wholly different from that presented in the present case; to changes made in the duplicate articles after the certificate has been given, and not to changes before the crew list is filed. The 10th subdivision of the section does not accordingly apply to the case. "All interlineations, erasures or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes, and the provisions of law which guard the rights of mariners." (*Act of Congress, July 20, 1840.*) The shipment of the libellant was regularly and legally made, and the duplicate list had nothing to do with that transaction. The engagement was upon the original articles, from which this duplicate is copied. The libellant could not, accordingly, leave the service of

The Steamboat Delaware.

the vessel because of any illegality committed in his shipment. The 10th subdivision is to be read in connection with the 8th, and not as operating upon the contract originally entered into in port, before the shipping articles or even the list is deposited in the custom-house.

My opinion is, that the libellant has not made out a case in which he is entitled to a certificate of cause for Admiralty process, and his application for an attachment against the vessel is denied.

Burr & Benedict, for libellant.

Joshua Coit, for claimant.

THE STEAMBOAT DELAWARE.

On a motion to show cause why an attachment should not issue against the parties for the payment of costs, or for other proper relief, the remedy is to be governed by the rules of the Supreme Court of the United States, or of this Court, if any apply to it; and if not, then, "according to the principles, rules and usages which belong to Courts of Admiralty, as contradistinguished from Courts of common law."

The provisions of the State statutes, or the decisions of the Courts, in explanation or enforcement of these laws, will not supply a rule of decision in this Court, unless such regulations are adopted by rules of the United States Courts.

Under the rules of this Court, a stipulation for costs includes a consent that execution shall issue against all the estate of the parties, in case the stipulators do not perform their engagements. An order or decree of the Court must be first obtained on default of the stipulators. That right to such process is now made positive and certain by a rule of the Supreme Court, so far as concerns goods and chattels, and the arrest of the person, in case the decree is not satisfied.

The party is entitled to either alternative of the 21st rule. Taking out a *j. fa.* in the first instance without success, does not prevent his resorting to process of *capias ad satisfaciendum*, or to an attachment. He may have relief at his option, as to the order of process.

Quere. Whether the arrest of stipulators, under a *ca. sa.* or attachment, satisfies the decree? also, whether, after a *ca. sa.* executed, the claimant may sue out an attachment?

W. Q. Morton, for the claimants.

S. B. Noble, for the libellant.

ON the attachment of the vessel at the suit of the libellant, a stipulation was entered into by him and Edward R. L'Amoureux, according to the course of this Court, in the sum of two hundred and fifty dollars, to secure the costs of suit, if decreed against the libellant.

On a hearing of the cause, upon the merits, on the 15th day of April last, the libel was dismissed, and costs to be taxed were adjudged in favor of the claimant of the vessel.

On the 24th day of October, an order or decree was entered requiring the above stipulators to fulfil their undertaking, or show cause on a day assigned, why execution should not issue against the estate, real and personal, of the stipulators.

On the 4th of November, a final decree for execution was made and entered, and execution of *fieri facias* or *venditioni exponas* was issued the 18th of November, and duly returned, *nulla bona*, as to both stipulators, on the 2d day of December.

Mr. Morton, for the claimant, thereupon, moved the Court, upon these proceedings, and an affidavit that the taxed costs had been demanded of the stipulators, and were not paid, for an attachment against them, to compel payment of the taxed costs, or such other relief as he may rightfully have.

BETTS, J.—It is to be remarked that L'Amoureux, one of the stipulators, was merely surety in the stipulation, and that the original costs are not taxed or

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decreed *eo nomine* against him, otherwise than as they are the subject of the condition of the stipulation, which the decree directs to be fulfilled.

The remedy, whatever it may be, under the decree upon the stipulation, is not to be in consonance with the statute law or practice of the State Courts, but is to be governed by the rules of the Supreme Court of the United States, or of this Court, if any apply to it, and if not, then "according to the principles, rules and usages which belong to Courts of Admiralty, as contradistinguished from Courts of common law." (*Act May 8, 1792, § 2; 2 Laws U. S. 300; Mauro v. Almeida, 10 Wheaton, 473.*)

The provision of the State statute giving a party an attachment to obtain the payment of costs, ordered and adjudged in his favor, (*2 Rev. Stat. 441, § 4; Sess. Laws 1840, 333,*) or the decisions of the Courts in explanation or enforcement of these laws, will not supply a rule of decision here, without those regulations are also adopted by rule of the federal Courts.

The rules of the Supreme Court were in force when the first proceedings were taken by the claimants to enforce the payment of these costs, and accordingly those rules are to be looked to as the paramount authority, controlling the whole subject matter.

The 21st rule provides, that when a decree is for the payment of money, the libellant may have, at his election, an attachment to compel the defendant to perform the decree, or an execution against the property, or for want thereof, against his body. In all other cases the decree may be enforced by an attachment to compel the defendant to perform it. (*3 How. R. Appendix, 7.*)

In this case an execution against the property of the stipulators only was prayed for and accorded, and it is urged in their behalf that the election of that process by the claimant concludes him from using any further or other form of remedy.

This proposition cannot, I think, be maintained. As a general principle, when a party is entitled by law to an execution against the property and person of a debtor, the suing out, in the first instance, one against the property, does not preclude his afterwards resorting to a *ca. sa.* against the body; (*Olcott v. Lilly*, 4 *Johns. R.* 407;) and that principle is distinctly recognised in the act of Congress, May 8, 1792, § 2, which provides that in judgments (in any proceedings of the United States Courts) where different kinds of execution are issuable in succession, a *ca. sa.* being one, the plaintiff shall have his election to take that out, in the first instance. (§ 2, 1 *Laws U. S.* 300.) According to the practice of this Court, a decree against stipulators for breach of their undertaking is equivalent to a judgment for the amount of the stipulation. (*Betts' Pr.* 27.) This is substantially the course of the English Admiralty, other than that lands cannot, in that manner, be made subject to Admiralty process. (2 *Browne Civ. & Adm.* 98.) The decree in this case was, in effect, for the payment of money; the amount to be ascertained or liquidated by a taxing officer of the Court. The stipulators thus became charged with the debt they had assumed by the stipulation. The amount of that assumption was determined by the taxation of costs. The recovery is not enforced by execution against stipulators upon taxation alone. That, like the report of a master in Chancery, settles the sum to be paid, and then a specific

order or decree may be had thereupon against the stipulators. (*Dist. Court, Rule 145.*)

Under the rules of the District Court, the stipulation includes a consent that execution may issue against all the estate of the stipulators; and the order or decree, upon default in observing the engagement, is correspondent with it. (*Dunlap Pr. 147.*)

The remedy is now made positive and certain, without the consent of the stipulators, in respect to libellants, on all decrees for the payment of money, by the rule of the Supreme Court, so far as respects goods and chattels, and is also extended to the arrest of the person, in case goods or chattels are not found to satisfy the decree; (*Rule 21*;) and by the same rule a direct proceeding, by attachment of the person, is authorized in all other cases.

Either, then, the claimant might proceed upon *the consent*, and take out execution against chattels and *lands* of the stipulators, or he is entitled, by the rules of the Supreme Court, absolutely to an attachment. A parity of reason would give him equally the process of execution against the body, in case there are not sufficient goods and chattels found to satisfy his decree, as a peremptory attachment is a higher order of process than a *captas ad satisfaciendum*. He takes, with his decree, the right to all the remedies supplied by the law; the rules of the District Court cannot restrict the remedy furnished by the rules of the Supreme Court; nor because he has unsuccessfully sought satisfaction of his decree, conformably to the course of practice of the District Court, can that Court withhold from him any further or more efficient process provided for the case by the Supreme Court.

I hold, then, that the claimant is entitled to execution against the bodies of the parties charged by the decree; and his having previously taken out an ineffectual one against the property, does not prevent his resort to this also.

But as the *ca. sa.* could have been embodied with the *fi. fa.*, and properly should have been so issued, the stipulators are not to be charged with the additional costs of taking it out as a distinct writ, if it is now elected, nor of this application to the Court, which was not necessary to authorize it.

I do not now touch the question, whether the rule of the Supreme Court, authorizing a *capias ad satisfaciendum* upon a judgment or decree for the payment of money, may stand in conflict with the act of Congress of February 28, 1839, abolishing imprisonment for debt. That question may arise and require a careful consideration and decision in case the claimant sues out a *ca. sa.*, and the stipulators are imprisoned under it.

The party is entitled to either alternative of the 21st rule; and as taking out a *fi. fa.* in the first instance, without effect, does not prevent his having afterwards the more stringent process of a *capias ad satisfaciendum*, so, also, he may avail himself of the still more coercive provision of the rule, and take out an attachment.

The true construction of the rule is not, in my judgment, that the *privilege of election* given by it confines the party to the remedy he first adopts; but when he has *bona fide* tried without effect one, he still may resort to other alternatives, especially when his election was not against the body of the party but against his property.

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It is not necessary to decide here, nor do I mean to touch on that point, whether an arrest of a party on a *ca. sa.* or attachment shall be deemed a satisfaction of the decree, so as to preclude the after use of a *fi. fa.*; nor whether, after having arrested the stipulators on a *capias ad satisfaciendum*, the claimant may resort to an *attachment*.

He will elect his remedy at his own hazard. No costs are ordered on this application to either party.

THE STEAMBOAT NARRAGANSETT.

If a steamer wrongfully placed herself in the track of another vessel, and in such circumstances as allowed the other no chance of avoiding a collision, the former is answerable for all the damages which might have been occasioned by her running into the other.

In case of collision, the party injured is entitled to recover the actual damages sustained, but cannot claim such as are merely consequential.

If a steamer and sailing vessel are approaching each other in such directions that a collision may be reasonably apprehended, it is the duty of the steamer to take proper precautions for avoiding the sailing vessel, particularly so if the latter be close-hauled on a wind.

In determining the merits in a case of collision, the Court will look chiefly to the facts in proof, and will pay but slight attention to the opinions and hypotheses of witnesses, especially those of each ship's company, in respect to the acts of the other.

Witnesses upon a vessel in motion, looking at another also in motion, cannot determine by the eye, unaided otherwise, with reliable exactness, either her course, distance or speed.

Plans and diagrams, intended to exhibit the courses, bearings and distances of two vessels approaching each other, are of no value as evidence, when framed merely upon the conjecture or opinion of witnesses as to the speed, relative bearing and distances of the vessels.

The actual damages sustained by a collision at sea are to be paid by the faulty vessel, both in respect to ship and cargo.

The colliding vessel is not exonerated from full damages, because after the wreck a portion of the cargo was injured or lost through the efforts of a third vessel to save it.

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BARRS, J.—This was a case of collision. The sloop *Corinthian*, proceeding from New-Bedford to New-York, and the steamboat *Narragansett*, going in an opposite direction, up the Sound, came in collision on the night of January 8, 1845, in the middle of Long Island Sound, about opposite the harbor of Southport, on the Connecticut shore, in consequence of which the sloop was almost immediately sunk.

This action seeks to recover the damages incurred thereby, with the expense of subsequently raising and saving the vessel, and also the damages and loss sustained by her cargo.

By the pleadings, each party exonerates himself and imputes all the fault to the other; and the testimony, by persons on the respective vessels, and concerned in their management, is in direct opposition, in respect to the acts of the vessels and the cause of the disaster. Their testimony, however, generally consists more in criticisms on the doings on the opposite vessel, than a clear statement of their own acts.

The opinions and inferences of witnesses on a vessel under way, in relation to the manœuvres of another, also in motion, afford no satisfactory or reliable evidence of the actual facts of the transaction.

This is especially so, if the occurrence be in the night, and the observations are made when the two are closely approximating each other. Courts accordingly, in this class of controversies, look most sedulously to the facts sworn to, independent of the judgment of witnesses, and in that aspect the knowledge of the witness is usually confined to what was done, ordered, or attempted to be done on his particular ship. It is out of the disaccord and clashing of these statements with the

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result, rather than the jarring opinions of the respective witnesses, that the Court must determine where the fault lay. Twenty witnesses were examined, at large, between the parties on the hearing, and taking in view the pleadings in the case, and giving credit to the testimony of the master and mate of the sloop, and the two pilots and wheelsman on board the steamer, in their statements of any act done by them on board their respective vessels, I find the facts touching the collision of the vessels to be these:

That the wind was west by north, light and dying away.

That the sloop was deep loaded, and standing on a course about southwest by the compass, holding as close to the wind as she could lay, and was making about three knots the hour.

The steamboat was steering east northeast, proceeding at the rate of about ten miles the hour.

She had lights set in her bows and aloft, and was first seen from the sloop twenty or thirty minutes before the collision, and was then supposed to be eight or ten miles off.

The sloop set a light in her rigging, which was seen from the steamboat one or two miles distance.

The sloop held her course without deviation to the instant the collision was seen to be inevitable, and then her helm was thrown hard a starboard, but not in time to make any change in her direction perceptible to those on board.

The steamboat, when the light of the sloop was descried, bore off one point south. The sloop, when next noticed by her, appeared to be coming head on to the steamer, and in the act of striking her at right angles.

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The wheel of the latter was instantly jammed over, by two men, with a view to wear her off, the vessels coming together nearly at the instant, and before the steamboat had yielded 'to her helm to any serviceable extent.

This statement of facts, if the case is to rest on them, would clearly prove the steamboat in fault. It was first her duty to take timely means to avoid the sailing vessel, and not press upon her so as to put her in jeopardy or alarm. (*The Shannon*, 2 *Hagg.* 279; *The Perth*, 3 *Hagg.* 414.) And, moreover, according to all the authorities, and upon the reason of the subject matter, the sloop could rightfully rely upon the steamer using due precaution to avoid her, and adhere to her course, particularly she being close-hauled upon the wind, and it would be incumbent on the steamer to adopt the measures which would leave her secure. (*Story on Bailments*, §§ 608, 609, 611; 5 *Rob.* 345; *The Thames*, 2 *Dods.* 83; *The Woodrop Sims*, 3 *Hagg.* 321; *The Jupiter*, *Ib.* 316; *The Chester*, 1 *Rob.* 131; *The Diana*, *Ib.* 182; *The Harriette*, 7 *Lou. R.* 222.) The officers of the steamer seemed aware of the obligation, and attempt, in their evidence, to clear themselves of blameable conduct in their approach upon the sloop and the collision. Her pilots and wheelsman testify that the sloop, four or five minutes previous to reaching the steamer, changed her course, keeping off to the south, seeing which, the wheelsman says, two minutes before the blow was received, the pilot had seized hold of the wheel, and ordered it shoved hard a port, the sloop having gone off full to the south.

Both these witnesses testify that the sloop, when they first discovered her, was off north from them, two

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points on the weather bow, steering southwest, or west southwest. It is proved that the bowsprit of the sloop, in the act of collision, crossed the deck of the steamboat nearly at right angles at the afterpart of the forward gangway.

The latter fact, it is contended, corroborates the evidence of the witnesses that the sloop had changed her course, and they allege that this wrongful manoeuvre caused the collision.

The witnesses on the other side represent the steamboat to have come upon the starboard quarter of the sloop, nearly stem on, and then as she passed by, in clearing her, pressed her round, bearing against the bowsprit, and wrenching it out of its bed and fastenings.

The shipwright who repaired the sloop supported this version of the transaction, judging it must be so, from the appearance and place of the wound on the sloop, and the condition of the bowsprit and its fastenings.

But the shipwright and others, who examined the steamboat the day after the collision, testify that they could discover no mark on her stem, not even the rubbing of its paint, and, in their opinion, the injuries could not have been inflicted by the striking of her stem against the sloop; but in their judgment the injury resulted in part from her lifting the bowsprit of the sloop out of its place, and chiefly by the wheels of the steamer breaking the timbers and beating in the starboard quarter of the sloop, as the two vessels hung alongside, and were separating from each other, the steamboat being high enough out of water, and having been kept under full way until after the separation of the two.

It does not appear to me, however, that the bearing of these facts authorizes the conclusion that the sloop had previously varied her course, or even if, at the instant, the movement of her rudder had slightly altered it, that she thereby became answerable for the collision.

Various diagrams have been exhibited, and computations of bearings and distances been made to demonstrate that the vessels could not have been brought in contact under their relative speed and bearings, if, according to the rule of evidence, greatest credit is given to the outnumbering witnesses on the side of the claimants, in those particulars, in which the two classes differ.

I confess I place slender confidence in this description of proof. The inferences from it depend wholly on the accuracy of the elements on which the computation is made, and a mis-estimate in trivial particulars of the courses, or distances, or speed of the two vessels, would take away all value from the hypotheses and conclusions upon which the plans are based.

For instance, no confident reliance can be placed on the conjecture in this case, that the sloop was two points on the weather bow of the steamer, and one and a half miles off, when first descried from her. It was in the night, the bearings were not taken by compass, and no other examination was made than merely a glance at the sloop. These considerations would prevent the evidence having any important effect, however intelligent and confident the witnesses might be. The main witnesses, in this instance, do not concur in the cardinal facts. The pilot inferred the sloop was one distance, and the wheelsman, observing her at the same moment, judged she was a greater one, the two differing from a half to a mile.

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In exhibiting the positions of the vessels, on a chart or diagram, those variations necessarily destroy all certainty in the calculations and conclusions attempted to be founded upon them. It is far more satisfactory to reject these surmises and conjectures, and resort to the facts in proof to ascertain with which party, if either, the fault rests.

In my judgment the facts show a want of due precaution and proper management on the part of the steamer on this occasion. The pilot was aware the sloop was approaching him on a fresh wind, at a rate which, coupled with his speed and their short distance, either one or two miles apart, must bring the two vessels across the same line almost instantaneously, for, on his lowest estimate, they were approaching at a conjoined speed of a mile in from two to four minutes. These facts demanded of him the utmost vigilance and alertness, and he was inexcusable in not instantly taking such course as would place both vessels out of danger. So, also, it is clear, upon the testimony of the experienced nautical experts, Captains Thayer and Comstock, examined by the claimant, that it was the duty of the pilot, in the position of the two vessels, to have gone north of the sloop, or to have borne off more than one point, if intending to pass south of her. This should have been manifest to him, for on his own testimony, the bearing of the two was such that if the steamer had not changed her course, she must have come upon the sloop head on, and run her directly under. He regards it a happy movement that he swung off the steamer one point or more, thereby rescuing the sloop from certain destruction by a direct blow.

But the proof is clear that the sloop had made no

change of her course when the steamer bore off. Her pilot misapprehended the relative position of the two until nearly in the act of striking. Instead of passing her half a mile to the south, as he supposed he should do, by bearing off one point, his course, until that alteration, must have been directly on her, and the only effect probably produced by the change he made was to convert a perpendicular blow into one slightly glancing or oblique.

The steamer, then, taking a direction east by north, and the sloop holding about southwest, would, as her stem passed the sloop, bring her beam nearly at right angles with the bow of the sloop, so that the bowsprit of the latter might cross the deck, as asserted by the witnesses who traced the mark. They do not state it to have been exactly at right angles to the steamer's side, but rather oblique towards her stern.

Be the angle of contact what it may, I do not accede to the argument of the claimant's counsel that its direction is a demonstration that the sloop must have been heading south, or that her movement was the cause of the collision.

Had she been at anchor, the drift and headway of the steamer passing under her bowsprit, might have produced a collision exhibiting the same external marks, though probably with less disastrous consequences.

Nor is it of any importance in respect to the rights and liabilities of the two vessels, whether the sloop came into the steamer, or the latter ran upon the former.

The steamer had wrongfully placed herself in the sloop's track, under circumstances leaving the latter no means of avoiding her. A collision, thus occasioned,

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would subject the steamer and owners to the same responsibilities as if the damage had been given by her running upon the sloop.

I do not think it important to discuss the differences between witnesses as to which vessel was to the north of the other when they came in sight, or what their actual bearing might be to each other's bows. I put the case essentially upon this, that the steamboat did not take due precautionary measures to avoid the sloop after it was ascertained the two vessels were running on courses which must bring them speedily across each other's track. In the night time, and in the uncertainty as to the velocity and proximity of the vessels, the duty of the steamboat was to go astern of the sloop, and not attempt to run under her bows; and though her pilot acted under the persuasion he could do it safely, and leave large room to the sloop to pass, the steamer must take the responsibility of the error in judgment, particularly as the claimants are unable to prove the sloop guilty of any fault contributing to the collision.

Captain Comstock was called to prove that the mate of the sloop gave a statement of the occurrence, immediately after the collision, in which he admitted the sloop had changed her course, and payed off her sheet, and that the two vessels came together at right angles, the bowsprit of the sloop running into the steamer's beam.

The testimony is adverted to now only in elucidation of the justness of the rule which enjoins the strictest caution in acting upon proof of declarations or admissions of parties or witnesses; for although Captain Comstock thus makes the testimony given by the mate, before a commissioner, stand in open contradiction with

that declaration, yet it is palpable that Captain Comstock is mistaken in his recollection, and that some other impression on his mind has been substituted for what he heard from the mate.

He was employed to attend the examination of the mate before a commissioner, and was, at the time of the conversation, travelling in company with him, for that purpose, and says he paid very particular attention to the whole of his deposition, taken immediately after those admissions; that the mate was a very intelligent man, and seemed honest and candid, and that what he stated upon that examination corresponded exactly with the declarations he had so made to the witness.

The impressions he then received, and under such circumstances, would be much more to be depended on than those collected from his memory a year after the event, and without association with a written record, to test the accuracy of his remembrance; and instead of operating as an impeachment of the mate's testimony, amounts to a strong confirmation of its truth.

The libellants are entitled to recover their actual damages incurred by the act of the steamboat, but they cannot claim damages that are remote and merely consequential.

The collision caused the vessel and her cargo to sink, and had they been thus wholly lost, the damages would have been the value of the two. (*Iron Duke*, 9 *Jurist*, 476.) In so far as the libellants have succeeded in rescuing either, to that extent the liability of the respondents is reduced or discharged.

There can be no difficulty, under the rule, in adjusting the damages incurred by the sloop itself; she is to be replaced at the expense of the respondents substan-

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tially in the condition she was when injured, and the cost of her reparation will ordinarily measure with reasonable certainty, the amount of damage. The same principle applies to the cargo. That portion lost by the collision must be paid for at its fair value, and that rescued is to be deducted at its value as saved (including expenses of saving) from the amount estimated as a total loss. In other words, the libellants take the cargo rescued at its net value, and recover damages commensurate to that not restored.

A question is raised in respect to the liability of the steamer for part of the cargo on deck, which was deteriorated or lost, by the capsizing of the sloop in an endeavor made to tow her into port by the steamer Eureka. It is alleged that the unskilful and improper manner of conducting the salvage caused the loss, and that accordingly it was only consequential to the collision; or if the deterioration or actual loss is chargeable against the steamer, she is not liable for the expenses incurred in recovering that part of the cargo lost overboard on such attempt to save the sloop.

I perceive no reason for a distinction in this respect, in favor of the steamer. If the Eureka had committed an act of trespass, or wilful wrong, it might be different. But she found the vessel under water, apparently abandoned, and applied those measures in her aid which seemed best calculated to afford relief. A hawser was carried out to her from the steamer, and efforts were then made to tow her into a harbor. The cargo had so shifted, however, as to render the sloop innavigable; after moving her a short distance, and finding she was careening, the hawser was cut, and the sloop remained under water, most of her deck load having

in the operation, gone overboard. I do not think a fruitless effort to save the wreck, made in good faith, and so far as appears with good judgment, though leading, by its failure, perhaps to additional expense and loss to the wreck or cargo, can be regarded as wrongfully causing such damage, and thus exonerating the steamer from it. The mode of saving the vessel and cargo ultimately adopted was doubtless the most efficacious and judicious, but in the absence of the means afterwards obtained and applied, it could not be blameable to try any other at command which afforded a reasonable promise of success.

In the then condition of vessel and cargo, those efforts were all apparently for the interests of the claimants, they being liable, in the first instance, for the entire value of both, their loss would be diminished in proportion to the amount of the property saved.

Efforts directed alone to the saving of the wreck, although resulting disadvantageously and imposing enhanced expense in its final rescue, do not change the nature of the injury, and substitute a new cause and liability in place of the colliding ship.

I shall, accordingly, decree for the libellants, to the amount of the injury done the sloop, the value of the property lost, and the expenses and disbursements necessarily incurred in the salvage of that which was preserved.

The particulars will be more conveniently ascertained by a commissioner, and I shall order a reference for that purpose.

Moore & Havens, for libellants.

Butler & Evarts, for claimant.

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THE STEAMER EXPRESS.

A vessel, although towed by a steamboat, if she has the full control of her own movements, will be liable for any damage inflicted by her coming in contact with another vessel.

The master and owners of a ship, towed by a steamer, will be answerable for damage occasioned by a collision with another vessel, unless they use all possible skill and care to prevent it.

A vessel coming in collision with another vessel is *prima facie* liable for the damage, and the rule is not varied, whether her motive power is the old and ordinary method, or is supplied in some novel manner.

Third parties, receiving an injury by collision, can rarely be required to lay the responsibility to any other agency than that which was the proximate cause.

If a vessel is run upon by another under way, the latter must be answerable for the wrong, unless she can prove the occurrence to be the result of inevitable accident, or without fault on her side.

A tug will not be responsible for damages done by vessels in her tow, whether they be lashed alongside or drawn by hawsers, except it be proved that the injury was owing to want of care or skill in the tug, in performing the duties belonging to her.

The analogy of principal and agent does not apply to this description of business. The tug, in executing the employment for which she is engaged, acts independently of all authority or direction of the tow, while the tow was, in this case, master of her own movements, and so answerable for them.

BETTS, J.—This cause was instituted for the recovery of damages, occasioned by a collision, and the particular feature of importance in the case is, the question of the liability of a tug, employed in her customary business, for injuries caused by the towed vessel coming in collision with a vessel at anchor.

In October, 1845, a canal boat, loaded with coal from Philadelphia, was taken in tow by the tug Express, at one of the North River piers, to be hauled round to the East River, and there united with other boats, and, together with them, to be towed by the tug to Albany

or Troy. The tug was at the time publicly engaged in that line of business.

The master of the tow desired to be lashed alongside the tug, because his boat steered badly, but the master of the tug declined giving her that position, and threw out a hawser from his stern, fifty fathoms in length, which was attached to the bow of the canal boat, and she was taken in tow in that manner.

Much testimony was given to the point whether that was a judicious and safe method of towing in this harbor. The plain weight of evidence proves that to be the usual and safe course of the business, in hauling loaded crafts of the size of the tow about the harbor, the tow fastened in that manner, being easily managed by her own helm, so as to protect herself and other vessels she may meet or pass. The tug was worked at her lowest speed, and such as was proved to be prudent and proper at the time and place, and which afforded the tow full opportunity and means of safe and easy navigation.

Below Castle Garden and near Whitehall pier, the tug passed between the shore and the yacht *Mist*, owned by the libellant, lying at anchor, and 80 to 100 feet from her. At that point, the tow took a sheer out into the river. Ten or fifteen fathoms additional line was payed out to her from the tug to give her free steerage. She did not recover her track, but struck the yacht abaft her forward chains, stove in her plank and some timbers, and caused very serious damage to her.

The testimony in the case is exceedingly diffuse, and not wholly reconcilable. The above facts are, in my opinion, the fair results, and present the essential points

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to be decided. There is no question that the yacht was properly anchored and attended to, and that no fault was committed on her part, any way conducing to the disaster.

She is accordingly entitled to indemnity for the injuries she sustained from the party inflicting them, unless he can discharge himself of all blame also.

The libellant contends, that the tug having supplied the motive power, and thereby forced the tow against the yacht, she is to be regarded the direct cause of the injury; that the vessel in tow is only a prolongation of the tug, and the latter is accordingly liable for the acts of the tow whilst under way, the same as for her own.

If this proposition cannot be maintained, the libellant insists the tug was guilty of misconduct and negligence at the time, in her own movements, and thereby caused the collision and injuries received by the yacht.

The transportation of property and persons, by aid of steam tugs, has, within a few years, become an important branch of navigation in this harbor and the waters connected with it. In other sections of the country it is also a business of great magnitude, and vessels of all dimensions are employed in its prosecution.

Sproul v. Hemmingway, was an action at law against the owner of a vessel towed by a steamer with a cable run out from the stern, for damages caused by a collision with the tow. The jury found that the collision was caused by the negligence, unskilfulness or misconduct of those who had charge of the steamer, (14 *Pickering*, 1,) and the Court decided that the owner of the vessel towed was not, therefore, liable for

the injury. The Court, in rendering its decision on the verdict, assume principles of law which have a bearing on the present case, but the point adjudicated under the facts cannot be regarded as involved in this, as no fault or negligence is here found against the tug. Another case was in the Supreme Court of this State, and is distinguished from this one in the important feature, that the tow was lashed by the side of the tug, and the tow being the vessel injured, the question was between those two vessels as to the obligation of the tug to protect the tow from injury by other vessels. The decision turned upon the effect of a special contract of towing between the parties. (*Alexander v. Green*, 3 Hill, 1.)

These cases do not accordingly afford direct authority upon the question presented in this. The evidence now before the Court clearly proves that a vessel towed in open water, in rear of another, with a fifty-fathom line, has perfect command of her own direction, so far, at least, as to keep in the track of the tug, and to avoid all stationary objects which the latter escapes, and that such was the safest method of towing her in this case, under the facts, for the tug and tow, and other vessels they might meet with. Not only has the tow perfect command of her own course, but she can also control the direction of the tug, and the usage of the business accordingly requires a competent helmsman to be stationed at the helm of the tow, better to protect her, and to aid in the safe navigation of the tug.

The evidence further proves, that if in this case the tow line had been shortened, and the canal boat drawn near to the tug, the means of managing both safely would have been impaired; and that the tow, if com-

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petent to navigate in those waters, was placed, at the time, in a proper position. I limit myself to stating the clear result of the evidence produced on the hearing. It is not necessary to spread out its details to elucidate the principles of law adopted in this decision. They are intended to meet the state of facts attendant upon the transaction, as laid before the Court by the proofs.

Beyond all question, the tow is liable in this case for the damages caused by her to the yacht. (*The Duke of Sussex*, 2 Rob. 270.) She placed herself in connection with the tug, undertaking to navigate across the waters of the bay by aid of the propelling power thus procured, which, though not itself under her control, left her, in respect to her own movements, a perfect capacity to prevent the injury caused by her in this instance. The case of *Sproul v. Hemmingway* is claimed to be apposite to this, and of controlling weight on the point. It is, however, to be observed, that the case was decided with hesitation by the Court, and as one of first impression.

Some of the analogies offered in support of the decision are so far equivocal, that it may not be unreasonable to suppose a review of the subject may lead the same Court to doubt the justness of the rule indicated, at least to the full extent suggested. At most, it cannot be regarded as authority to the point, that a tow placed astern of a tug, is not responsible for collisions with other vessels, the same as if navigated by her own means, and independent of the aid of a tug.

She selects that method of propulsion; and on general principles, by so doing, she ought to remain subject to the same liability that would attach to her if the mo-

tive power was within herself, or exclusively at her command. (*The Hope*, 2 W. Rob. 9.)

Third parties, receiving an injury by collision, can rarely be required to lay the responsibility to any other agency than that which was the proximate cause of it. If a vessel is run upon by another under way, the latter must be answerable for the wrong, unless she can prove the occurrence to have been the result of inevitable accident, or without fault on her side; (*The George*, 9 Jurist, 670;) and no reason is perceived why she is exonerated by having submitted herself to be moved by a steam vessel, unskillfully or incautiously managed, more than if the cause of the injury was the want of attention or prudence in the application or use of her own means of navigation.

It is not inevitable to her in any other sense than if the accident resulted from the insufficiency of her own equipments to keep her in a safe course, or disengage her from a position dangerous to others, or even the incompetency of her pilot or master. If it be conceded that the conclusion of the Court in *Sproul v. Hemmingway* is correct upon the facts found by the jury, I think the case cannot be accepted as settling the law, that a tug is responsible for damages done by vessels in her tow, whether they be lashed alongside or drawn by hawsers, except it be proved that the injury was owing to want of care or skill in the tug in performing the duties belonging to her. Chief Justice Shaw, in delivering the opinion of the Court, plainly recognises a liability of the tow for her own acts. He says, "on board the ship towed astern by means of a cable, something may and ought to be done by the master and crew in steering, keeping watch, observing and obeying

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orders or signs, and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the tow, and she and her owners must sustain it." I think, therefore, that the case of *Sproul v. Hemmingway* cannot be regarded as authority to the position that the tug is primarily liable in case of collision, when caused by the culpable fault of the tow and not her own.

This novel business demands an explication of legal principles adapted to its character and nature, and conducing to the protection of those concerned in it, and of the public; so that the liabilities incurred in its management may be allotted to that party alone which is justly chargeable with it.

Two distinct agencies are concerned in the operation of towing by lines, each capable of actions independent of the other. The tow in rear has the capacity of running off upon her hawser, in directions opposing the course of the tug, and to commit injuries to other vessels which the tug cannot restrain; and the tug may also compel the tow to cause like damages, which the latter has no power to prevent.

The principle sought for cannot be deduced from the case supposed in *Sproul v. Hemmingway*, of a vessel under charter, or the liability of the owner of cargo in respect to wrongful acts of the vessel carrying it. The inquiry in those cases is, how did the injury arise? and as consequent upon that, where does the responsibility for the damages attach? To render the analogies put in *Sproul v. Hemmingway* pertinent to the point raised in this case, it must be admitted that the

liability of the tug is the same when the tow is navigated according to the usage of the business, as it would be were she transported upon the deck of the steamer. If so placed, she would undoubtedly have, in respect to the movements and responsibilities of the tug, no relation to other vessels with which she should be brought in collision, other than that of cargo on deck.

But this supposition most inadequately figures the true character of vessels navigated by towing. The largest and most valuable shipping afloat are carried out and brought into port, and moved from point to point, and place to place, within our harbors and internal waters, by this mode of navigation, and the rule which gives the law in respect to small canal boats, worth a few hundred dollars, must settle it also essentially in relation to ships and cargoes of highest value.

Clearly, they cannot furl their sails and be towed through harbors and bays, without using their own means to protect other vessels encountered, and be free from liability for damages caused by them in being so navigated. The sound doctrine, in my judgment, is still what it always was, that the vessel coming in collision with another is *prima facie* chargeable with the damage sustained thereby, (9 *Wendell*, 1,) and the rule cannot be dependent upon her being navigated by old and well-known methods, or that her officers procure it to be done for her in some novel way, by a power communicated independent of their volition or command. It is at her hazard that she is placed under direction of such power; and if the tug which supplies it is liable for wrongful acts on her part, the tow cannot, in reason or law, claim to stand exonerated from

the injury she inflicts, and which she might have avoided.

Neither, in my opinion, does the analogy of principal and agent apply to this description of business. There may be traced a degree of similitude in certain points of the relationship between the tug and tow, and that of principal and agent, so far as concerns the end to be answered by the association of the two in one business, essentially transacted by one for the benefit of the other. But the tug, in executing the employment after it is entered upon, acts independently of all authority or direction of the tow, and stands no way in the relation of her agent. In all respects, except the general direction of the course to be run, the tow in this case was master of her own movements, and could vary them, in respect to objects in her path, as if wholly disconnected with the steamer.

The analogy is, therefore, too faint to supply any sure principle applicable to this peculiar association of vessels. It seems to me it might be defined, with a nearer approach to exactness, by regarding the tow as taking into service the *power* of the tug hired out to her, independent of the boat itself, or its command or direction.

If we might suppose locomotives employed on the tow-paths of canals, and the boats using that force as their propelling power, the parallel to the case under consideration would be nearer, and an illustration would be afforded indicating the responsibilities each would be placed under by the connection in towing, more correctly than is furnished by any cases familiar to the common law. It could not be supposed, under such circumstances, that the locomotive holding to its course,

would be chargeable for collisions or injuries committed by the boat in the ordinary train of its navigation.

The boat would be held to assume, at its peril, its own control and direction, and subordinate to propulsion ahead by a power which it could not vary or check, and differing in that only in the degree of its force, and its independence of the efforts to control it from on board the boat, from towing by hand or horse-power.

The responsibilities of those mutual but independent agencies should accordingly be limited to their separate acts, except it be shown that either of them wrongfully caused a mischief to be done by the other; and it would follow that the boat, equally with the locomotive, must take on itself the precaution to shun objects in its track, or which might come within the range of its movement.

When varying its line of direction to the limit of its capacity would not be sufficient to protect others from contact with it, she must have command of means, enabling her to be disconnected from the moving power, and thus have the ability to act for the safety of all in her pathway, as if using only oars or sails, or machinery attached to herself.

This principle is, in effect, involved in the *Hope*, where the colliding vessel was warped by those towing her down the Thames. (2 *Wm. Rob.* 9.)

Considering this case, then, as standing only upon the fact that the tow, whilst being properly hauled by the tug, came into collision with the yacht at anchor, I hold the responsibility therefor is not cast upon the tug, but that as the tow is the direct and immediate cause of the injury, she is the blameable party against which the remedy for the wrong is to be pursued.

So the comprehensive justness of the civil law ren-

ders the culpable party alone responsible for damage occasioned by his misfeasance, his negligence, his imprudence or want of skill. (*Code Napoleon*, Art. 1,583; *Toullier*, p. 3 §§ 95, 209.)

Each boat was separately and independently steered on this occasion, and the tow running three hundred feet in rear of the tug, with the free use of all her functions for self-direction in regard to the vessel injured, cannot, with any justness of figure or association of objects, be deemed a prolongation of the tug, subjecting the latter to the same liability for her acts as if the tow was bodily a part of her.

I do not think the libellant has succeeded in proving any misconduct or want of precaution on the part of the tug leading to the disaster, and which, upon general principles, or within the spirit of the decision in *Sproul v. Hemmingway*, (14 *Pick.* 1,) might render her liable for the damage.

It is a clearly settled principle in the authorities, English and American, that the vessel which sues for damages occasioned her by a collision, must prove the injury was owing to the fault of the colliding vessel. (*Abbott, Shea's ed.*, part 3, ch. 1; 3 *Kent*, 230.)

The proof that the injured one was herself blameless, would ordinarily be sufficient, *prima facie*, to cast the burthen of exonerating itself on the colliding vessel. (*Fbot et al. v. Wiswall*, 14 *Johns. R.* 304.)

Yet there is a manifest distinction when the action is not based upon any wrongful act directly committed by the vessel sued, but upon her alleged responsibility for the acts of another, that is, in effect, for damages consequential to the fault of another. The tug not coming in contact herself with the yacht, it is not to

be presumed, to her prejudice, that the act of the tow was culpable; and accordingly, the libellant is bound, as in ordinary cases resting in misfeasance, to prove that negligence, want of precaution, or other fault of the tug, caused the collision.

The whole evidence being before the Court, it is of little moment to this particular case, whether it is to be received as excusatory on the part of the claimant, or accusatory by the libellant; the Court must judge from its entire weight and bearing, without regard to the source from which it was derived, what rights are established between the parties.

First, then, I find upon the proofs, that the method of hauling the tow, by a hawser fifty fathoms long, attached to the stern of the tug, was, at the time and place, a prudent and safe mode of towing her. That the tow was conducted carefully by the tug, on a proper route, and so as to be able to keep a safe distance from the yacht; and that with ordinary care and skill on the part of her crew, she could have kept in the wake of the tug, and been steered widely clear of the yacht. That the collision was occasioned by inattention or want of skill in steering the tow, and was not owing to any defect of equipment, or the want of navigable qualities in the tow, and that nothing was done by the tug impeding the free steerage and action of the tow, or necessarily impelling her upon the yacht. That the tow had a competent number of men stationed on watch and at the helm, and was easily steered and kept by them in the track of the tug before and after the collision, through a route equally difficult, without danger or inconvenience.

The endeavor to show, on the part of the libellant,

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that the tow was hauled into an eddy by the tug, and thereby suddenly varied her course, giving her a sharp sheer off her track, failed of success. It was not made to appear but that the water at the place referred to was in a tranquil state, and every way favorable to the easy and safe manœuvering of the tow.

The accident is probably attributable to the want of attention or judgment of the pilot at the helm of the tow. There was ample room for her to have followed the tug between the shore and yacht, without exposure to the latter, and if the men on board had done their duty, there would have been no difficulty in her passing the yacht safely.

In my opinion the risk of her navigation, under the circumstances, was not cast by law on the tug, and she is not bound to make reparation for the severe loss and injury the libellant has suffered in consequence of the fault of the tow. She is answerable for no more than her own acts of mischance, negligence, want of skill, or other culpable faults. The remedy should be pursued against the tow in this instance, and this libel must be dismissed as to the tug, with costs to be taxed.

T. Sedgwick, for libellant.

H. Morton, for claimant.

NOTE.—This case was appealed, and additional proofs were introduced. The Circuit Court held that the libellant had proved that the collision was caused by the fault of the tug. That the sheer of the tow was inevitable, and without fault on her part; and that the tug had the power, and it was her duty to prevent the mischief caused by this sheering movement of the tow. The decree of the District Court was reversed, and damages adjudged against the tug.

THE SHIP HARVEST.

Services rendered in taking care of a ship in port are, under the statutes of the State, protected by a lien upon the ship, in cases where the sum of fifty dollars is due for such service.

A ship-keeper, by night or day, is not obliged, without an engagement to that end, to pump the ship, wash her decks, &c.

His sleeping on board nights, unless specially stipulated, does not impart a right to extra compensation therefor.

No abatement of wages will be made for occasional absence from the ship, if no objection is made thereto until the whole period of service has expired.

BUTTS, J.—This case comes up on exception to the report of the commissioners, allowing the libellant \$96.

The libel demands \$133 39, the balance of wages for keeping the ship in this port fifty days and forty-nine nights, at \$1 25 per day and \$1 50 per night, and also some small disbursements for fastenings to the vessel, and gives credit for \$5 cash paid.

The libellant acted as ship-keeper fifty days, and during the time slept on board the vessel.

When engaged for the service he was told he would receive from \$1 to \$1 25 per day, and expressed himself gratified with the job at that rate of compensation. After the service was completed, some complaint was made by the owners of his want of attention to the ship, but he was told he could have \$1 per day, and he stated his readiness to accept what they would give, and seemed satisfied with the sum proposed. The money was not paid or tendered to him at the time his

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services ended, and immediately after he demanded, through his lawyer, the whole sum of \$133 39, and payment to that amount being refused, this action was instituted.

The demand will be regarded a lien on the vessel, created by the Revised Statutes of this State, (2 R. S. 408, § 1,) unless the claimants have shown that less than \$50 was due, and in that case the question may arise, whether it can be enforced in this Court as a maritime lien.

It seems to me no just ground is laid in the proofs for an allowance to the libellant as night-watch, beyond the daily pay for which he contracted.

He does not show any agreement for such compensation, and he must, therefore, put his claim upon the *quantum meruit* of remaining on board over night. There is no evidence that his sleeping on board was a burthen imposed on him, or a service beneficial to the ship-owners; it may have been a private privilege or advantage allowed him. The Court cannot consider the naked fact sufficient to raise, against the vessel or owners, an obligation to pay for it. Nor does the evidence disclose any circumstance from which it may be implied that this particular was regarded at the time between the parties as extra service.

The commissioner reports one dollar per night to be the proper compensation for each night-watch. I think this is not authorized by any evidence in the case. It does not appear that the libellant actually performed the duty of a night-watch for the time, nor can it be supposed physically possible for him to have done so. I understand, on the testimony, that a night-watch is to be constantly on deck, or so about the vessel as to have

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watchful guard over her throughout the night, and it cannot be assumed that a man can endure that service continuously fifty days and forty-nine nights. I shall accordingly allow the exception to this part of the report.

Had the owners tendered the libellant the \$1 per day at the time of settlement, or when his demand was made with a view to this suit, I should have held that to be an acquittance of their liability to him.

But by not following up their admission of indebtedness by a tender of the amount, they subject themselves to all the consequences of a suit presented upon a contested demand.

They have, by their answer and proofs, attempted to show that the libellant was not entitled even to \$1 per day, because of unfaithfulness to his charge, or for not rendering services to the vessel required of him.

That portion of the defence permits him also to urge an extra compensation for services during the day, which are not, in an equitable point of view, strictly within his duty, nor satisfied by the per diem pay.

I think the occasional absence of the libellant from the vessel given in proof, do not entitle the claimants to any deduction from his wages; it is to be presumed, under the circumstances, that they were aware of the facts before the termination of his hiring; and the reasonable inference also is from their making no objection, that he was absent in their service, or with their permission; nor is it shown that he ought, as part of his duty, to have pumped the ship, or kept her decks washed down. These services would not fall appropriately within the duty of ship-keeping. To render him liable for their value, the claimants must prove an undertaking on his part to do the work.

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He gives evidence of extra care and attention in keeping a time account of the men employed about the vessel, and in view of the whole case, I think he ought to receive for his employment on board, at the rate of \$1 25 per day, the highest sum intimated to him by the owners at the time of his engagement.

He is also entitled to be paid for locks, fastenings, &c., necessary to the vessel, and supplied her by him.

The account, adjusted upon these principles, would leave due him \$62 50, for wages, and \$2 39 for materials, &c., supplied, from which deducting \$5 paid him, the balance, \$59 89, would be the sum he is entitled to recover.

This being above \$50, renders it unnecessary to consider whether a remedy could be had in this Court for it, upon the principles of the maritime law alone.

The Court enforces liens on domestic vessels under the local law, when they partake of the character of maritime liens. (*The Ship Robert Fulton*, 1 *Paine*, 620; *Peyroux v. Howard et al.*, 7 *Peters*, 324; *The Ship Thomas Scattergood*, *Gilpin*, 1; *A New Brig*, *Ib.* 474.)

There must be deducted from the report of the commissioners \$34 11, and a decree entered for \$59 89, and costs.

W. Mulock, for libellant.

W. M. Pritchard, for claimant.

THE BARK CHILDE HAROLD.

Extra or double wages are given seamen when put on short allowances of provisions or water on a voyage, only in case the quantity required by law is not supplied the ship by her master or owner.

If the ship has a proper supply laden on board, and the crew is insufficiently furnished on the voyage, their remedy is by action for the particular wrong, and not for double wages.

All the crew may unite in a suit for double wages because of a short allowance of bread, and each is a competent witness for his fellows.

It devolves upon the libellants, in such action, to prove both that a short allowance was served them, and that the vessel had an insufficient supply laden on board.

If they fail in maintaining their action, and it appears there was no colorable cause for bringing it, they will be charged with full costs of suit.

When one of the libellants unites a demand for contract wages unpaid him with his claim for short allowance, and obtains a decree for those wages, the Court will only allow him proportionate costs against the vessel on that demand, not including witnesses fees to his co-libellants, and will order full costs against him in connection with his co-libellants upon the other branch of the litigation.

THE libellant, Duffie, sues to recover wages on a voyage from New-York to Callao and back, and he, with his five associates, also claim the equivalent of their contract — wages for a period of six months and a half, because, as they charge, they “were on a short allowance of good and wholesome ship-bread,” the “master having neglected to put on board the requisite quantity of provisions for the said voyage, according to the act of Congress,” &c.

The answer denies these allegations, and asserts that the vessel was supplied with a sufficient quantity of good and wholesome bread for the voyage. It avers, also, that all the libellants, except Duffie, were paid the

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wages claimed by them, in full, on the arrival of the vessel at this port, and that at the same time Duffie's wages were offered to him, which he refused to accept.

The answer denies that he is entitled to enforce the payment of wages, because of his mutinous and insubordinate conduct on the homeward voyage, having refused to obey the orders of the master to assist at sea in repairing damages the vessel had received in a gale, which had placed her in a crippled and unseaworthy state, and that on the voyage homeward he accosted the master in rude and insulting language, seized hold of him, and threw him down, and held him confined on the deck, until he was relieved by his officers, &c.

The facts proved by the witnesses are sufficiently given in the opinion of the Court. The cause was argued by

Mr. E. Burr, for the libellants, and by

Mr. F. B. Cutting, for the claimant.

BETTS, J.—The provision in the act of Congress of July 20, 1790, section 9, upon which the contestation for short allowance is founded, is this: "Every vessel bound across the Atlantic Ocean shall, at the time of leaving the last port from which she sails, have on board, well secured under deck, at least one hundred pounds of wholesome ship-bread for every person on board, and in like proportions for longer or shorter voyages; and in case the crew of any vessel, not so provided, shall be put upon short allowance of bread during the voyage, the master or owner shall pay to each of the crew one day's wages beyond the wages

agreed on for every day he shall be so put on short allowance, to be recovered in the same manner as his stipulated wages."

The crew claim double wages in this action, because a sufficient allowance of good and wholesome bread was not served out to them during the voyage, and each of the libellants made a witness for his co-libellant, testified to the bad and unwholesome quality of the bread, and all concurred in saying, that after six weeks out to the completion of the outward and return voyage, the bread served the men was mouldy, rotten, filled with maggots and vermin, and when put in tea, the worms were skimmed off in spoonsful, and that it also stunk. Kelly, one of the men, and not a libellant, gave in substance the same representation. On his cross-examination, every witness stated that there was no short allowance of quantity, and most of them also said, the vessel sold from her stores of bread on the coast of South America, and brought back several barrels and three hogsheds of bread laden on board before the voyage began, and which had not been opened.

The question is raised by the claimants upon this state of facts, whether the libellants bring their case within the provisions of the act of Congress.

The statute is plainly intended to compel owners and masters to fit out vessels with a sufficiency of wholesome provisions for the voyage, and its direct language does not extend beyond that requirement. (*Mariners v. The Washington*, 1 *Peters' Adm.* 219.) No regulation is made respecting the distribution of bad provisions or short allowances, whilst the ship is supplied with good, or enough in quantity. Parties wronged, by being furnished at sea insufficient or improper pro-

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visions or water, are left to their legal remedies, as in other cases of maltreatment, not provided for by statute. Feeding a crew on unwholesome or spoiled provisions would justify their leaving the ship, and such neglect or malfeasance of the owner would subject him, at the least, to pay full wages for the voyage. (1 *Hagg.* 59; *Ibid.* 186; 2 *Peters' Adm.* 255, and note; *Ib.* 411.)

The construction of the clause in this Court has been, that the seamen must resort to their special action for damages against the master for giving them insufficient or improper food, whilst the ship had on board enough of good quality; and if the master proved his original supply had been sufficient, but it spoiled or was destroyed on the voyage, that he was still liable to the action, if he neglected to procure, when within his power, an adequate supply.

This interpretation of the statute, and the rights of seamen in respect to their supplies of food on ship-board, I am inclined to maintain. I am persuaded seamen will be more thoroughly protected by such exposure of owners and masters to special damages, than if they may be exonerated by payment of this specific penalty for wrongs which must often demand a recompense more punitive and compensatory than a duplication of wages.

The statute gives the right to double wages in case the crew of a vessel, *not provided* with the quantity of provisions specified, shall be put on short allowance; and manifestly the statutory right and cause of action does not arise when in fact the vessel commenced her voyage with the quantity of provisions on board demanded by the statute. (*The Mary, Ware's R.* 459.)

Congress did not assume to regulate the provisioning of a crew further than regards the amount to be supplied on board for their support.

The pleadings in suits for short allowances are framed in consonance with this understanding of the act. So, in this case, the libellants allege the master neglected to put on board the requisite quantity of provisions for the voyage, according to the act of Congress. This allegation is the gravamen of the complaint, and the proofs and the recovery must be governed by it.

The action is not to be maintained, then, upon the fact alone, that a crew is put on short allowance; the additional particular is equally an essential ingredient, that the ship had not on board the stores required by law when she sailed on the voyage.

It is contended by the libellants, that as they prove bread of a bad and unwholesome quality was served out, and they were not allowed a just ratio of that which was good and wholesome, that the burthen of proof is cast on the claimants to show the vessel properly stored on her departure.

In ordinary acceptance, a party prosecuting is bound to prove on his part every fact necessary to the support of his action; so that when his right of action rests upon several facts and averments, it is indispensable that he furnish evidence of the existence of each. (1 *Chitty*, 216-256.) Moreover, it is a rule of evidence, when an issue involves a charge of culpable omission, it is incumbent on the party making the charge to prove it, although the proposition be a negative one, for the other party shall be presumed to be innocent of the imputation until he is proved to be

faulty. (*Hartwell v. Root*, 19 *Johns.* 345; 3 *East*, 192; *Roscoe on Ev.* 52.)

The proofs, perhaps, need not be equally direct and cogent in respect to each particular, when two or more are the basis of the action, for the existence of one may be in some degree implied from that of another; as if the proof be satisfactory, that immediately on the commencement of a voyage the crew are put upon a close short allowance, and so kept habitually during the continuance of the voyage, very slight evidence of the insufficiency of the supply of provisions on board will cast on the owner the burthen of proving he had fully complied with the law.

I do not say the same implication might not arise respecting the fitness of the provisions, where those served were uniformly bad, although the evidence on the part of the libellants was limited to proving the quality of the rations, if there was any reliable evidence showing carelessness or fault in the selection and lading of the provisions put in the ship. But the rule ought not to extend to requiring the owner to give evidence of the quantity and quality of provisions stored on board, when the testimony of the libellants show, there was an abundant supply in the ship, and only accuses it inferentially of being unwholesome in quality when shipped.

Upon all the testimony submitted by the libellants in this case, I do not think even a presumption is raised that the provisions on board were deficient in quantity, which the claimants can be called upon to repel, by proving they furnished the vessel in the outset sufficiently. The whole contestation has proceeded upon the question of the wholesomeness of the bread served the men.

If this point should be decided in their favor, there would be no semblance of right in them to recover the double wages demanded under the statute, without the further fact is found by the Court, that the bread was not wholesome when put on board. These positions of law must control the case, and be fatal to the suit of the libellants upon their own evidence.

But the testimony of Captain Dean and the mate Forsyth, respecting the quality of the bread remaining over from the previous voyage, and of the large excess brought back on this, and of Mr. Taylor, who furnished the supply for the voyage in question, proves, beyond any fair ground for doubt, that the bread was abundant in quantity and wholesome, and of a good quality when put on board and the ship went to sea. These facts would be decisive of the present action.

But I feel constrained to say, that I am satisfied upon the whole proofs that the representation of the men as to the condition of the bread during the voyage is a sheer fabrication; that it is all grounded upon their receiving occasionally biscuits taken from some barrels which had been wet on the outside, and were approaching to mould, whilst the main body of the bread in the same barrels was sound and wholesome, and is found so now after the completion of the voyage, and the return of the bread to this port.

It seems to me evident that this claim for short allowance was fabricated in aid of Duffie's suit for wages, and was not thought of by any of the crew when the vessel came in and had completed her voyage.

All, except Duffie, received their wages when discharged, and intimated no claim of this character, or even complaint as to their fare on the voyage, and

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Duffie declined taking his wages with the others, threatening to sue the master for an assault and battery, without suggesting any demand against the ship or owners for short allowance.

Afterwards he changed his mind, and wished to receive his wages. His counsel wrote the master they held his account for wages, and asked payment of the amount, without the coupling any demand for short allowance with it; and the owners not being willing to satisfy his demand, because of insubordination on the voyage and maltreatment of the master with which he was charged, this action was brought to recover his contract wages, and in the same suit his shipmates became joint parties with him, in a claim of extra wages for six and a half month's short allowance.

A demand put in prosecution under such circumstances would, at all times, be looked at with great distrust. I do not say acceptance of the stipulated wages, and giving receipts therefor, would legally bar the crew from setting up afterwards a claim for short allowance; but such claim interposed subsequently must necessarily be subject to severe and jealous scrutiny, and when supported almost entirely by the oaths of the prosecuting parties, each swearing for his companions, and all expecting to recover upon facts mutually proved for each other, a Court would exact a strong and most satisfactory case before making a decree in its favor.

The case, so obnoxious to suspicion and doubt on its face, is further met by evidence on the part of the owners, satisfactorily showing that the main representations on the part of the libellants in their testimony are unfounded in fact, or gross and wilful exaggerations

as to the state and quality of the bread; and accordingly, on this branch of the case, I unhesitatingly decree against the libellants, with costs.

The remaining question respects the right of Duffie to wages.

The pleadings and proofs in objection to this demand exhibit a case of gross insubordination and misconduct and violence on his part, which would justify a punishment equivalent to a forfeiture of wages, if the master or owners stood in a situation allowing them to make this defence.

Considering the allegations of the answer fully proved, still it appears to me the master has remitted or pardoned the offence, if not entirely, certainly to that degree that he would not be allowed to plead the transaction as a bar to wages.

Duffie was the best and most efficient hand on board. His conduct had been unexceptionable to the time of the disorderly and mutinous affray complained of. The master did not arrest and confine the offender, or subject him to the discipline of the ship for insubordination or misconduct, nor did he give Duffie to understand his offence would not be overlooked, or that he would be called to answer for it on the arrival of the ship at a home port; neither did he make it the subject of complaint to the civil authorities, or even to his owners when the voyage was ended. On the contrary, the very day, and within a few hours after his misconduct, Duffie resumed his work as usual, doing his duty faithfully and quietly, and so continued at his place during the voyage, without reprimand or question on the part of the master. When the crew were discharged, the master procured the money for Duffie and

The Bark Child Harold.

offered him his wages in full, but Duffie refused to accept them, saying, he intended to sue the master for an assault and battery in the affray complained of.

The master testified, in explanation of his proceedings, that he had intended accompanying the payment of wages with a suitable reproof, but he did not administer it, because Duffie declined taking his pay.

On the same day, Duffie relented and called on the master, and asked to be paid his wages. The master then refused to pay them, and charged that they had been forfeited. The same afternoon, as the master was about leaving the city, he received a note from Duffie's proctors, requesting payment of the wages. He made no objection to the demand, and handed the note to the owners, who agreed to see to the matter for him. They subsequently refused to make the payment, but it is not proved that this was done at the request or with the approval of the master. I think, under these circumstances, it was too late for the master or owners to revert to the offence committed a month before, as working a forfeiture of wages for the voyage, or urge it to the Court as a ground of punishment by way of mulct or abatement of wages.

I shall accordingly decree wages to Duffie. If the amount demanded by him is not agreed to by the claimants, a reference must be had to a commissioner to ascertain the sum due.

There is a difficulty in disposing of the question of costs on this branch of the case. The Court has arrived at the conclusion that the claimants could not properly contest the payment of wages with Duffie, after the open and continued acts of the master, by implication, at least, condoning his offence on the voyage.

They ought not to be allowed, in gratification of their own resentments, to create a litigation on that point, with impunity from costs, knowing that the master had overlooked or condoned the misconduct of the seaman.

On the other hand, it is manifestly inequitable that this libellant, who, in conjunction with his associates, has forced the owners to an expensive litigation upon the groundless claim for short allowance, should have the advantage of throwing on them the costs of the whole controversy, by now recovering against them full costs, with his wages.

All the taxable costs, or nearly so, must necessarily have been incurred in the suit for short allowance, without the adjunct of this demand. The owners, finding this tacked to those unfounded claims, might have been induced to make defence to the demand of wages by Duffie, when if the action rested on that alone, they would have satisfied it without contestation.

The costs decreed against the joint libellants on the claim for short allowance would not be an adequate redress to the claimants, because, if Duffie is allowed to tax full costs on this branch of the case, he imposes on them a large portion of the very costs they are exempted from by the decree in their favor.

For instance, they should be discharged of the marshal's fees on arrest, and keeping of the vessel, all disbursements made in bonding her, and various other particulars entering into the charges of the proctors, clerk and marshal, as well as all expenses for the attendance of witnesses, no witness being called to Duffie's demand for wages, who was not also used to prove the short allowance sued for.

The Schooner Active.

I shall, in view of the whole case, and in the exercise of the discretion the Court possesses in the allotment of costs, order that a separate bill of costs be made up in favor of Duffie, and that the claimants be chargeable only with those services specially and necessarily applicable to his demand for wages; and that he be entitled to recover only one-sixth of the charges of the marshal and clerk on the arrest, bonding and discharge of the vessel, and only for the attendance of Kelly as a witness, the other witnesses being all parties to the suit, and not entitled to fees as against him.

A decree will be entered conformably to these directions.

THE SCHOONER ACTIVE.

The mere giving of a promissory note by the debtor for supplies furnished a ship, is no satisfaction of the debt, nor is accepting it a waiver of the lien the creditor may have had therefor.

Nor will the principle be varied, although the credit was given to the agent, or his note taken for the debt, unless it be proved that the principal had settled with the agent, and his rights would thereby be prejudiced.

A ship built in the United States for alien residents abroad, becomes their property without any documentary title. It passes like any other chattel.

The right of lien for supplies against a foreign vessel rests on the maritime law, and is not affected by local legislation.

The departure of such vessel from the State before her arrest does not bar the lien or remedy upon it in Admiralty.

BETTS, J.—This was a suit *in rem* to recover the sum of \$156 98, for supplies furnished the schooner before her departure from this port. She was built in this

The Schooner *Activa*.

city, in the year 1845, for and on account of the claimants, who are aliens, resident in South America.

She was never documented as an American bottom, and was cleared and went to sea as the property of the claimants. Owing to some disaster, she shortly after returned to this port and was arrested by the libellant on this demand. The libellant, a provision dealer, sold to Rodriguez, the agent of the vessel, and for her use, provisions for her contemplated voyage, and had them stowed on board.

He accepted the promissory note of Rodriguez for the amount, \$156 98, and gave a receipt for the note as payment of his bill for beef and pork supplied the *Active*.

The proctor of the libellant produced the note in Court, and offered it to the proctor of the claimants to be cancelled, and has left it in Court for that purpose.

Rodriguez had dealt on his own account with the libellant previously, and was in good credit; but immediately after giving this note, he absconded, and was found to be insolvent.

The mere giving of a promissory note by the debtor for an existing debt is no satisfaction of the debt. (8 *Cowen*, 77; *The Bark Chusan*, 2 *Story R.* 457; *Story on Promissory Notes*, §§ 104, 404.)

Nor is it more so if given by an agent, unless the principal proves he subsequently settled with his agent, and was damaged by allowing the amount of the note as cash paid him. (*Story on Agency*, § 434.) No such evidence is given in this case. Upon these principles it is clear the debt remains valid and subsisting against the principals, notwithstanding the absolute credit given their agent, in this instance, also the ship's husband.

The Schooner Active.

Nor do I conceive that taking a promissory note was a waiver of the lien the libellant originally had on the vessel for those supplies as against the claimants, whatever might be the effect of that act in respect to third parties *bona fide* acquiring rights or interests in the vessel.

Whilst the note remained in circulation, or outstanding, it operated as a suspension of the lien; but on its surrender, or the offer to surrender it, the libellant was remitted to his original privilege, and could proceed *in rem* against the vessel, unless barred because of her domestic character. (*The General Smith*, 4 *Wheat.* 438; *Ramsay v. Allegré*, 12 *Wheat.* 611; *Peyroux et al. v. Howard et al.*, 7 *Peters' R.* 324; *Andrews v. Geiger et al.* 3 *How. R.* 568; *The Bark Chusan*, 2 *Story R.* 457.)

It is argued that the schooner being built in this State is necessarily subject to the local law as a domestic vessel, and that she cannot acquire the character of a foreign bottom, until documented conformably to the laws of the United States, or of the domicile of her foreign owners.

I apprehend the law is otherwise. The property in a vessel under our laws is acquired and disposed of the same as any other chattel, (3 *Kent*, 130,) and there is no evidence that the law of the owners' domicile is different, if that fact could vary the rights and remedies of the parties. To give her the privileges and benefits of our navigation laws, she must be documented pursuant to the provisions of those laws. The absence of such documents does not prove her to be a domestic vessel; on the contrary, it subjects her to be treated as a foreign one under our revenue laws, and, by parity of reason, in all other respects. That she left the State

The Ship Moslem.

before the demand was preferred against her, does not accordingly bar the rights of the libellant to this remedy *in rem* in Admiralty, because the Court takes cognizance of the demand under the marine law, and not by force of the State statute.

I shall, therefore, pronounce in favor of the libellant for \$156 98, with interest from November 28, 1845, the date of the note, and his costs to be taxed; the note to be delivered to the claimants, or cancelled at their election.

A. Nash, for libellant.

H. Nicoll for claimants.

THE SHIP MOSLEM.

If seamen are shipped on a vessel unseaworthy at the time, they may rightfully abandon her or refuse to do duty on board.

When seamen know a vessel is leaking three or four inches the hour in port, and came in from sea in a leaky state, and they ship on board mainly to help pump her on her home voyage, they are not absolved from their contract because the leak continues or even increases on the voyage, if she was seaworthy when she left port.

Where a ship on a voyage from Manilla to New-York, went into Cape Town leaking, and there received partial repairs, and on survey was pronounced seaworthy, and shipped seamen for the home voyage, but in order to have the advantage of the trade winds, and smoother seas, and sooner to reach a suitable port for repairs, made for Pernambuco, that is not such a deviation as to discharge the seamen from their obligations to her. But if the master intended to take that course when he shipped the crew, or left Cape Town, he was bound to make it known to them.

It is no unreasonable service to require a full crew to keep a staunch vessel free of water which does not make exceeding four inches of water the hour; but if at the beginning of the voyage the crew become apprehensive of great danger, it is not disorderly or mutinous conduct for them, in a body, to apply respectfully to the officers, and urge that the ship be put back to port.

If, on that application, the master engaged to pay each man one dollar extra per day to continue the voyage, and work the pumps, and promised to sight the

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island of St. Helena, and to enter the port, if necessary, his failure to run in view of the island was not such a violation of contract as to release the crew from their obligation to the vessel, and justify them in refusing to do duty on board.

It was in the sound discretion of the master, in view of the safety of the ship and her company, to go into, or pass the island. Those who for that cause broke off work, and defied the authority of the master, were guilty of mutinous misconduct, and might be coerced back to duty, and also subjected to forfeiture of wages.

A punishment by abstraction of wages may be a partial or total withholding of them.

If, on the arrival of the ship at Pernambuco, one of the crew claimed his right to leave the ship, because of her deviation, and refused to do further duty on board for that cause, but was afterwards subdued to the authority of the ship, such disobedience is not cause for the forfeiture of his wages.

The subsequent disorderly and mutinous behavior of the seaman, and obstinate refusal during the home voyage to do duty, deprives him of all claim to after wages, but does not retroact and forfeit those earned previous to arrival at Pernambuco.

PETER SCOTT, filed a libel against the ship Moslem, claiming the wages stipulated in his shipping articles; and also extra wages of one dollar per day on a voyage from the Cape of Good Hope to Pernambuco, and thence to New-York.

After the action was commenced and the ship attached, John Rooney, Samuel Phillips and Thomas Channan united in this suit as co-libellants, making like demands of contract and extra wages.

The pleadings on both sides are crammed with harsh and criminatory allegations and extraneous statements, by each party against the other.

The substance of the charges and issues, which were the subjects of contestation on the trial and entered into the judgment of the Court, related, on the part of the libellants, to the deception and misconduct of the master towards the libellants, in hiring them at the Cape of Good Hope, and taking them to sea, and in his un-

The Ship Menden.

just and cruel treatment of them on the voyage to Pernambuco; and in respect to Scott, his continued confinement in chains at Pernambuco and during the voyage from that place to New-York; and on the part of the claimants to the disorderly, insubordinate and mutinous conduct of the libellants on shipboard.

The rate of wages at which the libellants shipped, and the period they were respectively with the ship, was not in dispute.

The case made by the averments of the libel is, that the libellants were shipped at Cape Town for a direct voyage to New-York. That the ship arrived at Cape Town from Manilla, leaking badly, and continued to leak at the rate of three or four inches the hour, during the period of two or three weeks she remained in that port. That after she put to sea, the leak increased to ten inches the hour. That the libellants, and the rest of the crew, respectfully requested the master to return to port, because of the unseaworthiness of the ship, but he refused to do so, and deviated from his voyage, and ran to Pernambuco. That because of their remonstrances against being forced to remain with the ship in her unseaworthy condition, and against the severe labor imposed upon them at the pumps, the master put them in close confinement on board, and deprived them of necessary food. That he engaged to pay them each one dollar a day extra wages from Cape Town to Pernambuco, but refuses to pay the same, or any part of their wages.

The answer avers that the ship was seaworthy when the libellants shipped, and when she sailed on the voyage. It denies any deviation, and charges that the libellants forfeited their wages by insubordinate and

The Ship Moslem.

mutinous conduct on the voyage. It is unnecessary to set forth with greater particularity the details of the pleadings. All that are material are comprehended in the issues above stated. Each libellant was examined as a witness for his co-libellants. The main facts which apparently entered into the judgment of the Court are gathered from a mass of contradictory allegations, and exceedingly diffuse and rambling statements found in the depositions and oral evidence offered on the trial. They amount substantially to these :

The ship, on her return voyage from the East Indies, put into Cape Town in a leaky state. She lay in port three weeks. Some of her crew left her there. The four libellants shipped there for the home voyage to New-York, making up an extra complement to the ship's company. They knew the ship was in a leaking condition, and shipped with express notice that their services would be mainly required in pumping her on the voyage.

The ship leaked two or three inches the hour when she went to sea. After being out about thirty hours, the libellants made known to the master that they were unwilling to proceed on the voyage because the ship was unseaworthy, and requested to be put back to Cape Town. There was nothing disorderly or disrespectful in their proceedings on that occasion. The rest of the crew united in that request. After consultation on board, the ship was put about, and an attempt was fairly made to work her into port. The wind and current being against her, it was found, after twenty-four hours effort, that she made no headway, and the master called all hands and told them he could make St. Helena easier than get back, and would run so as

The Ship Moslem.

to sight the island, and would put in for repairs if the condition of the ship rendered it necessary; and if the leak did not increase he would make Pernambuco, and there have the ship hove out and fully repaired. To encourage the crew he engaged to give each man one dollar a day extra wages if they would work faithfully on the voyage. The chief work was at the pumps, the ship running free on the trade winds, exacted but slight labor in her navigation.

The leak continued without intermission, and required heavy services at the pumps to keep the ship clear. The evidence varied widely between the men and sub-officers as to the degree of leakage and labor; the libellants, in their testimony, represent the leak to have increased to ten inches the hour, which would require, in the estimation of the mate, 4,500 strokes of the pump per hour to keep the ship afloat. He does not estimate the leak to have exceeded four inches the hour at any time, or to have required more than 750 strokes an hour to clear her.

Several ship-masters, experienced in voyages to and from Calcutta, Manilla, &c., testified that they considered the ship seaworthy, manned as she was and running with the trade winds, if she made three or four inches of water the hour, and that 1,000 strokes the hour would be no extraordinary labor at the pumps, as she was manned and provided. The ship, after receiving partial repairs, had been surveyed at Cape Town before going to sea, and pronounced seaworthy. The leak was supposed to have been in her upper works.

The libellants, from the time the ship resumed her voyage, after the fruitless attempt to work back to

The Ship Morden.

Cape Town, became reluctant and slack in their work, and disobedient to the officers. Scott was the ring-leader, and was on different occasions insubordinate and insolent to the master, and acted as if determined to shirk all duty. After the ship passed St. Helena, the libellants openly refused to do duty, and went below in defiance of the officers. Scott declared himself an Englishman, and denied the authority of the master over him. They then sung *Rule Britannia*, in a rude and boisterous manner, and damned the American flag, and refused to come on deck and return to their duty. The master ordered them to be kept in confinement below and on short allowance of provisions for their disobedience and misconduct.

They afterwards submitted to the authority of the officers and were again put to duty. When the ship arrived off the roadsteads of Pernambuco, the libellants became turbulent and insubordinate, and assaulted the master; a handspike was raised upon him by one, and Scott seized and held him fast, tearing his clothes. Scott was put in irons for the offence, and was frequently afterwards called upon to return to his duty. The other libellants submitted and went again to their duty. Scott, however, utterly refused to do so, and continuing mutinous and stubbornly insubordinate, was kept under confinement at intervals during the stay at Pernambuco, and then permanently until the arrival of the ship at this port.

The claimants gave direct and positive proof that before the suit was brought the wages of Rooney, Phillips and Channan were paid in full, and their receipt therefor was also given in evidence. Their proctor testified that the master and owners refused to pay any

extra wages, and only paid what the captain asserted was the balance due them on the shipping articles, and the libellants denied that the account he made out of their wages was true. He was contradicted in this statement by the person who made the payments.

Mr. A. Nash, for the libellants, insisted that the master deceived the men as to the condition of the ship when they shipped, overworked them cruelly at the pumps during the voyage, and had deviated from the voyage for which they shipped; that they had a right to refuse doing duty on board, and to leave the ship the first opportunity, and collect full wages to New-York; that they had not incurred a forfeiture of wages. That Scott was wantonly maltreated and imprisoned at Pernambuco and on the voyage thence to New-York, and that all the men were entitled to one dollar each per day extra wages for the full voyage home. He cited *Ware*, 109; *Gilpin*, 83; *Ibid.* 140; 9 *Johns. R.* 158; 8 *Law R.*; *Anthon's N. P.* 32; 1 *Hall R.* 238; 4 *Mason R.* 84; 1 *Hagg.* 182; *Ibid.* 59; 3 *Esp. R.* 7; 2 *Sumner R.* 13; *Jacobsen's Sea Laws*, 142; *Ware*, 219; *Curtis on Merchant Seamen*, 296, 299; 2 *Hagg.* 243; 2 *Peters' Adm. R.* 415; 2 *Sumner R.* 11; 14 *Johns. R.* 260.

Mr. E. Burr, for claimants, contended, on the facts, that the libellants established no right of action.

BETTS, J.—It will not be attempted in the examination of the merits of this case, to settle or discuss all the topics brought into the controversy in the multifarious evidence or protracted arguments of the par-

ties. Four or five entire days have been exhausted on the hearing. The testimony upon various points in dispute cannot be reconciled, and the judgment of the Court has not unfrequently been governed more by the strong probabilities surrounding the case, than the positive assertions of witnesses.

In respect to the condition of the ship when the libellants entered upon the voyage, I deem it less important to determine whether she was fully seaworthy than to ascertain the fairness of the dealing of the master with them. They were English seamen ashore, out of employment, and seeking an opportunity to leave the Cape. The ship lay about three weeks in the port undergoing repairs, and they had full opportunity to inform themselves of her state, so far as that could be known from external appearances and the degree of leakage, because, not only was her condition a fact of notoriety, but they were in intercourse with some of her crew who had left her at that port, and were themselves frequently about her, and, as it would appear, also on board her at her berth.

The master explained her situation to them when they were hired, and engaged them expressly to aid in working the pumps, assuring them their general work in navigating her would be light, as he had shipped extra hands.

My attention has been carefully directed to this particular, as from the general heedlessness of sailors they are exposed to be drawn into improvident bargains; and these men, in a degree destitute, in that remote part of the world, where the opportunity to select their employment must be rare, would be eminently liable to imposition or disadvantageous engagements. But,

looking watchfully at the whole evidence to this point, I am satisfied the libellants entered into this agreement with a plain understanding of its character and probable hazards, and that the officers of the ship practiced no deceit or improper influences with them in making the shipping contract.

Still, if the ship was actually unseaworthy at the time, or proved to be so when she entered upon the voyage, the libellants were not bound by their contract, and could rightfully refuse to continue the voyage and compel the master to return with the ship to port. (*Porter v. Andrews*, 9 *Johns. R.* 350; *The United States v. Ashton*, 2 *Sumner*, 13.) The conduct of the libellants in requesting the master the first day out to go back to the port of departure, because of the leaking of the ship, was respectful and proper, and if not obeyed, provided the ship was unseaworthy, would have dissolved their obligation to remain with her and incur the hazard of a voyage on board. The master most properly submitted to their demand, and I think satisfactorily proves, he attempted in good faith to comply with it. His judgment, that greater danger was incurred by beating back against wind and current in her then state than by continuing his course upon the trade winds, is confirmed and justified by the judgment of several experienced shipmasters who were examined to that point on the trial. This was clearly explained to the crew at the time, and all hands went freely to their duty and put the ship upon her course. After this the libellants were bound to obey the orders of the master, and lend their services faithfully in the work of the ship.

I do not consider the statement of the master to the

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crew that he would run in sight of the Island of St. Helena as a positive engagement to make that direction part of the route, so that a departure from it would constitute a deviation. The marine laws are peremptory that the master shall perform the voyage stipulated in the shipping contract, and holds the seamen discharged of their obligation to the ship if he deviates from it. (*Curtis' Rights of Seamen*, 25.) But this duty respects the *voyage*, its inception, and its specified *termini*, and has no relation to the track or line of navigation pursued in accomplishing it. That must, from its nature, be contingent, or regulated at the sound discretion of the master. Had the libellants proved an express agreement of the master to run in sight of St. Helena, it would be no deviation, in a maritime sense, to have varied his route so as to fail of a literal fulfilment of such engagement. To keep intentionally away from the island would be a breach of the terms of such engagement, but it would be *damnum absque injuria*, if no necessity existed for resorting to that port. Of that necessity the master, from his position, must be judge, and if he acts in good faith and fairly upon the facts before him, his decision should be final. He considered the vessel capable of making Pernambuco, that she was under no exigency to seek St. Helena, and that there was no object in stopping there except to save the crew from imminent peril to their lives, as the ship could not obtain repairs at that port, and the interests and safety of ship and crew required him to pursue the most direct course to Pernambuco. This conclusion is fully supported by the evidence in the case.

Nor under the facts can the claim of the libellants

The Ship Moleen.

prevail, that they were absolved from all obligation of obedience and duty to the vessel because she was put upon the course to Pernambuco, and not directly to New-York. Ordinarily, the shipping contract is to be understood as contemplating a direct voyage from the port of departure to that of its termination, unless a different course is stipulated in the agreement, or is plainly made known to the seamen. (*The Minerva*, 1 Hagg. 347; *The George Home*, *Ibid.* 182.) But in this instance, after the ship left port, a departure from the shortest line to her port of destination would be justifiable on the fact that Pernambuco was the nearest accessible port at which the repairs needed could be obtained; and also because it was the surest and speediest route in the condition of the ship. A change of voyage which may discharge mariners from the obligation of their contract, must be wilfully made by the master, and enforced against their consent or acquiescence. (*The Nimrod*, *Gilpin*, 84.) This is a common course of navigation with vessels bound from the Cape to the United States, and might reasonably be implied as so understood by the libellants, as they were in the port, waiting and seeking the opportunity of a return to this country. They made no opposition or objection to this course of the voyage, when it was declared to them and was resumed, and the promise of extra pay had been given them. They grumbled afterwards, and were insolent and occasionally insubordinate, but their complaints were against the state of the ship and the labor exacted of them, and not to the course run, until they were carried past St. Helena. Then it was they refused to perform further duty on board unless the ship was taken back to the island, and persisted in the refusal

until coerced by close confinement and privation of food to yield and return to their services.

These facts, I think, afford a satisfactory presumption, that if the master intended going to Pernambuco when the libellants were hired, they were apprised of it, or that if that route was fixed upon after getting to sea, they either acquiesced in it, or the change was one of probable necessity, and thus excusable in the master. Under either circumstance, the libellants were bound to a full obedience and faithful discharge of their contract, and their misconduct on that occasion, in my opinion, justly authorizes the owners of the ship to resist the demand for wages, and have, at least, judgment of forfeiture of the extra pay, being a proportion of the libellants' wages. The Court is not compelled to pronounce a forfeiture of the entire wages, but may punish malfesances or dereliction of duty at sea by such abstraction of wages or mulcts as will, in its judgment, supply an appropriate punishment. (*The Baltic Merchant*, *Edwards R.* 219; *The Lima*, 3 *Hagg.* 359; *Cloutman v. Tennison*, 1 *Sumn.* 373; *Pothier on Maritime Contracts*, art. 178; *The Elizabeth Frith*, 1 *Blatchf. & How.* 195.)

The after submission of the men to the authority of the ship, and return to duty, with the acquiescence of the master, and their continuing to serve on board until her arrival at Pernambuco, should operate in equity to preserve the wages agreed in the shipping articles. I do not hold the transaction an entire condonation of their offence, yet I do not think the master should be allowed to inflict corporeal punishment sufficient to bring the men back to duty, avail himself of their services, and then exact a confiscation of their whole wages for

conduct, although highly disorderly and mutinous, yet based upon colorable grounds of wrong towards them, and of right on their part to hold themselves discharged of all obligation to the ship.

The point taken on the defence, that the engagement of the master to give the crew extra pay was obtained from him by duress, or unlawful compulsion, is not tenable.

It was proposed spontaneously by himself, and in the exigencies of the ship and all her company, was reasonable and proper in itself, and would be upheld in favor of these men, had they not sacrificed their rights by their own after misconduct.

It is further insisted, that this claim was satisfied by the master after the termination of the voyage at this port, and was included in a receipt in full, taken by him on settlement with all the men except Scott. The testimony of the libellants' proctor, and a clerk of the claimants' proctor, in respect to that settlement, stands in direct conflict. Without deciding the question of credit between those witnesses, and independent of the other special grounds of defence, I shall place the denial of extra wages to these men, exclusively upon the right of the owners to their forfeiture. The proof is ample that their contract wages were fully paid, and that they became parties to this action solely to recover their extra pay.

It is therefore ordered, that the libel be dismissed in respect to Rooney, Phillips and Channan.

Although Scott had been the ringleader in the disturbances and mutinous conduct at sea on the passage from Cape Town to Pernambuco, yet I regard his restoration to duty by the master, on his confession of his

The Ship Moolam.

faults and promise of good behavior, a remittance of the absolute forfeiture of wages he had incurred, and I shall not accordingly discriminate between his case and that of his fellows up to the arrival of the ship at Pernambuco roads.

The statements in the proofs of the transactions at Pernambuco in respect to Scott are entangled and equivocal, and lack that fullness and certainty which might enable the Court to determine satisfactorily the true character and extent of his offences at that place. He was at times disorderly and dangerous, and was punished severely therefor, on ship-board and on shore, and it would appear that the master considered these punishments adequate and sufficient for the offences, as he offered to receive him back to his place in the ship. The other men involved with him in the misconduct accepted the pardon, and performed duty up to the arrival of the ship in New-York, and were there paid their wages in full.

Scott maintained an unflinching refusal to submit, declaring he had been kept so long in irons he would remain in that condition to New-York, and be judged there, and he was accordingly confined in irons on board during the voyage home.

Scott addressed a letter to the master at Pernambuco, manifesting penitence and humble submission to his authority, promising to refrain from liquor and behave well thereafter. It is not clearly shown why that repentance was not accepted by the master, and it has not been made to appear distinctly that the letter was not written during his last confinement at that port, although much rambling and incoherent evidence was given tending to show that the letter was written long

before the ship left the port, and that the conduct of Scott was constantly violent and refractory until her departure.

Scott insisted he was entitled to a discharge at Pernambuco, and that the master had no rightful authority over him there; and so far as he may be regarded acting under an honest belief in that right, his refusal to yield to the commands of the officers of the ship should be considered leniently, and his first offer to return to duty should have been accepted. The proofs, however, tend strongly to the conclusion that this submission was in fact offered and accepted on his first imprisonment, and that he immediately afterwards renewed his disorderly and mutinous conduct, and was imprisoned therefor on shore and in the ship. After he was brought back to the vessel, in irons, and on the homeward voyage, he was repeatedly urged by the master to return to his duty, but he peremptorily refused to do so. This conduct necessarily bars his demand for wages from Pernambuco to New-York.

Desiring to look as favorably as the testimony will admit at extenuating circumstances on the part of seamen, when a total forfeiture of wages already earned is sought for, I hold that the master has not given sufficient proofs to make the misconduct of Scott at Pernambuco, and from thence to New-York, forfeit his antecedent wages, and shall, accordingly, decree in his favor for the balance of wages due and unpaid, on the arrival of the ship at Pernambuco.

I cannot collect from the proofs the true state of his accounts with the ship at the time he was imprisoned at Pernambuco, and, unless the parties agree upon the amount, it must be referred to a commissioner, to

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ascertain the sum then due him, deducting all payments made him.

The final decree will include all proper directions in respect to the details of the judgment and costs.

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The estimate or judgment of witnesses formed in the night time, and expressed orally, or exhibited on charts or diagrams on a vessel in motion, are of slight weight in determining the relative position and bearing of another vessel, also under motion.

A vessel close-hauled on the wind has a right to rely to the last moment on the ability and care of another meeting her with the wind free to avoid a collision, and is not responsible for a wrong movement on her part, caused by the negligence of the one running free; but a vessel close-hauled is bound to hold her tack, so as not to come round in the way of one free and endeavoring to avoid her.

A vessel running free has no right to cross the bows of a beating vessel, unless she has clearly room to do it without disturbing her course; nor to come so closely upon the stern of the other as to create apprehensions of a collision, and alarm her into a change of her course to escape it.

A vessel on the wind has the right to run out her tack, and it is the duty of another vessel approaching her before the wind to take the necessary precautions to avoid a collision.

The customs as to the navigation of the North River are in consonance with nautical usages at sea, and the rules regulating such navigation are the same as obtain in regard to sea-going vessels.

Geo. A. Shufeldt, for libellants.

A. L. Jordan, for claimant.

BETTS, J.—This is a case of collision between two sloops on the North River, and the extent of damage incurred renders it one of serious importance to the respective parties. It has been litigated at great ex-

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pense, and through protracted and tedious inquiries into the facts. The law and facts bearing upon the case have been thoroughly discussed; orally before the Court, and by able and well-digested written arguments submitted by the counsel. The statements of the transaction by the witnesses do not strictly coincide with the representations of the parties in their pleadings, but the variances are, perhaps, deserving no special regard, other than in respect to the effect they may have upon the credit of some of the witnesses, whose testimony is called in question.

The libellants charge that the sloop Bucktail, owned by them, being on a voyage down the river to the city of New-York, and about opposite the end of the long dock at Rhinebeck, and nearly in the middle of the river, making a tack to the westward, the wind ahead, blowing straight up the river, the sloop Argus was seen coming in the opposite direction before the wind, and standing directly for the Bucktail; and as soon as within call, she was hailed by the Bucktail to bear up or to luff; that no attention was paid to the direction; on the contrary, she continued her course, heading for the Bucktail, until her stem struck the larboard bow of the Bucktail, cutting it down to the water's edge, from which injury she afterwards sunk and was totally lost.

The claimant answers, that the night was very dark, and the atmosphere thick and hazy, so that objects could be distinguished but a short distance; that the wind was blowing heavily from the southeast; the Argus was on her course up the river, from New-York to Hudson, bearing about northeast; when she was opposite the long dock at Rhinebeck, and near the west shore of the river, the Bucktail was discerned from her

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a very short distance ahead, obliquely to the eastward, beating down the river, on a tack from the eastern to the western bank of the river, with the wind so favorable as to be able to hold her course nearly with that of the river. That it was judged advisable to keep the Argus away to avoid a collision, and she was steered in a proper angle towards the westerly bank of the river, so that she could have safely passed the Bucktail on her lee side without danger of collision, if that vessel had kept her course as she was bound to do ; but that after the direction of the Argus had been so altered, the Bucktail deviated from her proper course, and ran directly across the bows of the Argus, thus producing the collision complained of.

The other parts of the pleadings need not now be rehearsed, as the gist of the controversy is involved in these allegations. Before adverting to the proofs adduced by the parties, it is proper to observe, that the estimate or judgment of witnesses, as to the bearings, distances or relative positions of objects on the water looked at in the night-time, and particularly when the witnesses are placed on vessels in motion, cannot be considered entitled to confidence as facts. They are little more than conjectures, formed in a state of mind and position disabling the witnesses from speaking with any reliable certainty.

The course of the river, at the place of the casualty, is assumed by the witnesses to be north and south, and the direction of the wind, and the track of the two vessels, are probably estimated with reference to that assumption ; and as the true range of the river is a point or more east from the one supposed, the relations of the other particulars would have to be taken with

corresponding allowances. Indeed, both the proofs and the arguments concede, that a variance of several points from any of the supposed courses might be reasonably expected and accounted for, without impeaching the veracity or intelligence of the witnesses.

These considerations must lead to great caution in adopting diagrams or charts framed upon the courses assigned the two vessels by the respective witnesses, as affording any just criterion by which the facts in controversy may be adjusted.

A few prominent particulars in the case, not essentially in dispute, appear to me to settle the question between the parties as to the wrong or negligence of the claimants' vessel, and the right of the libellants to damages.

The Bucktail was sailing against the wind, be its exact direction at whatever point may be assumed, and her longest stretch or tack was from the east to the west. She was loaded below, and had bundles of hay on deck so piled up as to require the boom to be raised by a reef in the mainsail, and this trim would somewhat impede and embarrass her management. It was night, but not dark enough to prevent the two vessels being seen by persons on each, at a distance of half a mile to a mile apart.

The Argus was light, and running free before the wind, about in the middle of the river, which, at the place in question, was a mile wide, with the channel from shore to shore.

The Bucktail came around on her larboard tack a quarter of a mile above the long dock at Rhinebeck, and was supposed by her pilot to range off about a south southwest course, and by those observing her

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from the Argus, to head southwest. The defence is placed essentially upon the position that she was able on that wind to hold her course, which, if adhered to, would have carried her far east of the track the Argus was running; and, also, on the proposition of law, that the Bucktail was bound to pursue the course she had taken, whilst the Argus was only required to use measures for avoiding her, on her continuing to hold that course as close to the wind as she could be laid until her tack was run out.

The counsel for the claimant submits various diagrams to substantiate the conclusions he draws from these considerations. Whatever nautical theories may be raised in respect to the relative bearing, ability and duty of the two vessels, I am satisfied, upon the proofs, that up to the point of time at which a collision became apparent and imminent on board both vessels, the Bucktail was managed by her crew with ordinary skill and precaution.

There is nothing in the evidence necessarily conflicting with the statements of those on board the Bucktail, that she was kept steadily on her course as near to the wind as her build and trim would permit. She took her direction towards Kingston Point, intending to run out her tack in that vicinity; and upon the evidence, this would bring her scarcely half a mile below a right line across the river from the place of her departure on the tack. The actual course she was making across the water could not correspond with any of the hypotheses of the witnesses on either side, for though it was undoubtedly, by the compass, south of west, yet the notions that it was southwest or south southwest, were only conjectures, and of slight moment

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in the case, it being satisfactorily proved that she was kept close-hauled to the wind, with a view to Kingston Point on the west shore as the terminus of her tack.

The libellants' witnesses testified in consonance with the libel, that the collision took place near the middle of the river, opposite Rhinebeck dock, which, as appears from the surveys, was about eighty rods below the beginning of her tack.

The Bucktail would accordingly have made southing a quarter of a mile, and reached nearly half the distance across the river towards Kingston Point.

The witnesses for the claimant concur substantially in placing the two vessels near the middle of the river when they met, and there can be no question, upon the evidence and the plan of the various courses, that if she had made, from the start, a south southwest or southwest course, she could not have run beyond the middle of the river, in falling down a quarter of a mile, opposite to Rhinebeck dock.

But the claimant's answer, by which their defence must be governed, avers that the collision took place *near the west shore of the river*, opposite Rhinebeck dock. This is palpably a gross error, for by no possibility could the Argus be so placed, having a view of the Bucktail at that distance, as to act on the belief that the latter was holding a southwest course, with a wind asserted to be nearly free for her from the time she came about to the moment of collision; and it would be physically impossible the two vessels could, under the circumstances, come in contact on a line nearly at a right angle from the point of departure of the Bucktail. If the Argus saw the Bucktail come about, a mile off, then the two vessels must have run an equal dis-

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tance in the same time, and directed to the same point, in order to effect the meeting, and the Bucktail, instead of heading down the river, must have been necessarily and obviously to the eye, laying at nearly right angles across it; which would have been emphatic notice to the Argus not to attempt to cross her bows.

If the distance of a mile and the position of the Argus on the west shore is disregarded, and the Bucktail is assumed to have been seen three-quarters, a half, or quarter of a mile distant, the Argus being in the middle of the river, the difficulty of reconciling the claimants' theories and diagrams with the proved facts, are no way diminished; on the contrary, they are multiplied and enhanced.

The nearer the two vessels are placed to each other, at the moment the Bucktail came round on her larboard tack, the more difficult and improbable would be a collision in the manner this occurred; for the Argus continuing her course in the middle of the river, every moment she advanced in that direction, with a speed superior to that of the Bucktail, she would necessarily be running out, and passing the point where the Bucktail must cross her track, even at right angles, and the more oblique the course of the Bucktail on the wind, towards that line, the more improbable would be their meeting on that line.

This improbability of contact upon these assumptions would become next to an impossibility, on the allegations of the answer. The Argus is by the answer placed near the west shore, opposite Rhinebeck dock, which, it is seen, is only a quarter of a mile below the position of the Bucktail, on the opposite side of the river; and if, instead of the two running in dif-

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ferent directions, both had endeavored, on the most direct line, to reach the point of collision, it would be utterly incredible that the Argus would not, before a strong and free wind, in her trim, have passed the point before the Bucktail, deeply laden, could beat the same and even a greater distance.

It is, therefore, most clear, that if the proofs had been *secundum allegata*, and shown the Argus running her course before the wind, near to the western shore, when the Bucktail came about, there could be no rational mode of accounting for the collision on the proofs, but by supposing the Bucktail, after the Argus passed her track, bore up, and by superior speed, overtook and ran into the latter vessel.

The answer and proofs of the respondent do not so correspond that they can stand together and establish the case for him in either aspect, but yet the proofs may be used to countervail the evidence adduced on the part of the libellants, and take away their claim to a recovery. So, also, the claimants' proofs or answer may be invoked by the libellants, in support of their version of the transaction.

The statement of Swart, the helmsman, and War-ringer, the pilot of the Bucktail, is in substance, that she was beating down the river, westward on her larboard tack, and as close to the wind as she could lie, when it was found that the Argus had taken no measures to avoid her, and the two vessels were approaching each other rapidly, in a way threatening an immediate collision. That the Argus was hailed loudly to luff, and not obeying the order, the Bucktail bore up, and instantly was run into by the Argus, on her larboard bow; and that if any watch had been kept on the Ar-

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gus, the danger would have been seen on board her in time, and she could easily have avoided it.

Testimony is given by the claimant tending to impeach the credit of Swart; and direct and strong evidence that a look-out was kept on the Argus, and that the Bucktail was distinctly seen, and her movements watched from the time she came about; and if she had held the course she took on that tack, and which her capacity as a sailor, and the direction of the wind enabled her to hold, she would have gone clear of the Argus, and that the collision was the consequence of her fault in these respects.

If Swart's general character is impeached by the evidence, still the answer of the respondent in this behalf directly corroborates his statement, and that of Warringer, so that in respect to this branch of the issue, that testimony must prevail against any number of witnesses offered by the party who put in, and swore to the correctness of the answer.

The allegations of the claimant are, that the night was very dark and hazy, that objects could be distinguished but a *short distance*; that when the Bucktail *was first discovered*, the Argus was kept away to the west shore, and "*when the course of the Argus had been so altered*," the Bucktail was made to deviate from her true and proper course, so as to run across the bows of the Argus, and make a collision between the two unavoidable.

This places the two vessels precisely in coincidence with the description given by Swart and Warringer, and demonstrates that the Argus did not observe the Bucktail until the moment she attempted to avoid her by bearing away; and the presumption is exceedingly

strong, that the attention of the Argus was first called to the Bucktail from the cry of the latter to luff, which was heard by her, and which was so urgent as to call up one of her men from below.

Whether, in that emergency, the most prudent and discreet course was pursued on board the Bucktail, in bearing away, also, it is not important to inquire and determine. She had a right to rely to the last moment upon the ability and care of the vessel before the wind, and if in the alarm, resulting from the instant danger, she adopted a false manœuvre, that will in no sort excuse the Argus, or take away the right of the Bucktail to claim damages, since the confusion, and all the consequences of the then situation of the two vessels, arose from the fault of the Argus. (*The Diadem*, 1 *Robinson, Jr.*, R. 132; *The Celt*, 3 *Hagg*. 321; *The Harriet*, 1 *Robinson, Jr.*, R. 182.)

I am by no means satisfied that any wrong manœuvre was made by the Bucktail, or that she had it in her power to take any course, when it was found that the vessels were directly upon each other, which would have rescued her from the danger that was upon her.

The Argus had no right to pass the bows of the beating vessel, unless she had clearly room enough to do it without driving her into the wind, or to come so closely upon her stern as to alarm her for her safety, and induce her, under such apprehension, to bear away before the wind.

There was the full breadth of the river to the Argus, with a free wind, and it was her duty to observe the Bucktail and take such a course as to leave her undisturbed on her tack.

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It is clear to my mind, upon the evidence, that this was not done, and the unfeeling neglect on board the *Argus* after the disaster to stop and aid the crippled vessel or ascertain what might be her danger, although urgently appealed to with the cry that she was sinking, and from the refusal on the part of her officers to give the name of the vessel, is impressive evidence of conviction on board of the *Argus* that the wrong had been wholly on her side.

Moreover, the character of the injury received, as detailed by the ship-carpenters, is very strongly corroborative of the statements of the libellants' witnesses, that the *Argus* struck the *Bucktail* stem on, and did not receive the blow obliquely from the *Bucktail* to the windward of her, and in the act of escaping the contact.

There is no conflict between the parties as to the law applicable to the case. The libellants do not deny that it was the duty of their vessel to hold her course down the river, as uniformly as the circumstances under which she was sailing, (combining wind, the tide, the lading and trim of the vessel, and her capacity as a sailer would admit, certainly until coming near the *Argus*, and having great reason to fear the latter would not take measures to avoid her; and the claimant admits that she was entitled to run out her tack, and that it was the duty of the *Argus*, while such course was pursued, to take precautions, from her having a free wind, to avoid intercepting or injuring the *Bucktail*, so maintaining her direction. These views are elucidated, and the principles of law applicable to them are very fully discussed in the books. (*Story on Bailments*, §§ 608, 609, 611; *Rathbun & West v. Paine et al.*, 2 *Wend.* 452; 19 *Wend.* 399; 3 *Kent*, 184; *The Celt*,

2 *Dods*. 83; *The Chester*, 3 *Hagg*. 321; *Ib.* 316; *The Diana*, 1 *Rob.*, Jr., 131; *The Harriet*, *Ib.* 182; 7 *Lou. R.* 222.)

The proof of the established usage and custom in navigating the North River is in consonance with nautical usages at sea, and the rules of law laid down in the authorities above cited.

In my judgment, the evidence in this case clearly casts the blame upon the *Argus*, and imposes upon her the duty of bearing the loss. There was manifestly a want of proper precaution on her part, or of skill and attention in managing her, in her approach upon the *Bucktail*, and however severe the consequences may be upon the absent owner, the law lays upon him and his vessel the responsibility of repairing the damage which she has occasioned.

I must, accordingly, pronounce for the libellants in this cause, and decree that they recover damages for the injuries they have sustained, which must be a compensation for the actual loss of property. (*The Dundee*, 1 *Hagg*. 120.)

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JOHN NEVITT v. WILLIAM CLARKE AND OTHERS.

If a sick seaman be sent from a ship to a hospital in a foreign port, and the ship leaves the port without his rejoining her, he is not to be regarded absent without leave, so as to stop the running of his wages. A contract of hiring for a voyage to different ports in the Pacific and back to the United States, or for a period of eighteen months, is not fulfilled as to the ship-owners by lapse of the term, or by the seaman remaining behind in a hospital abroad, unless opportunity, means and time are afforded him to return to his home port.

A ship having left a seaman at Valparaiso and immediately thereafter proceeded to Callao, where she was sold to foreigners, and taken into their employ on a different voyage, he was not bound to rejoin her, or offer to do so if within his power. In such case the owners are liable to the seaman in damages for the breach of the shipping contract on their part. These damages are not made vindictive on the footing of a wilful tort, but are usually measured by the actual loss to the seaman.

Quere. Whether, if demanded in the libel, the extra wages given by the act of Congress of February 27, 1803, can be recovered in addition to wages and expenses?

Ship-owners will not be held liable for the value of a seaman's wearing apparel and effects, upon proof that he left the ship to be placed in a hospital, without other evidence showing they were detained on board.

The privilege of seamen to be maintained by the ship, and cured at her expense of a disease or disability incurred in the service of the ship, continues no longer than their right to wages under their contract in the particular case.

The case of *Reed v. Canfield*, (1 Sumn. 202,) considered and doubted. When objections are made at the hearing, to the want of proper form in the pleadings or proceedings, apparent upon their face, the Court will permit an amendment to be made therein *instantly*.

It can, also, at discretion, allow amendments to the merits in the pleadings at any stage of the cause prior to a final decree.

When a party proceeded against is named in the body of the libel, a decree *secundum allegata et probata* may be rendered against him, although he is not named in the prayer for relief.

If a party to an action dies pending a suit in this Court, and the cause of action survives, no disadvantage accrues therefrom to either party. A suggestion of the fact *apud acta*, removes the technical difficulty.

THIS action was commenced *in personam* against the respondents, as late owners of the Bark *Mescino*, and

seeks the recovery of eight hundred and eighty-five dollars, with interest thereon. Six hundred dollars are claimed as wages due the libellant, for his services as seaman on board the vessel; the further sum of one hundred and ninety-seven dollars for board in the city of New-York, during the continuance of a sickness contracted on board the vessel on her voyage, and seventy-five dollars for his clothes, &c., alleged by him to have been kept by the master of the bark on board the vessel, and never restored to the libellant.

The facts established on the trial of the cause were, that the libellant shipped in New-York for a voyage in the vessel to various ports in the Pacific, and back to the United States, or for the period of eighteen months, at twelve dollars per month.

The vessel left this port in February, 1840, and arrived at Valparaiso in May thereafter. The libellant then left her and was taken to the hospital, and continued there until July following, when he was shipped by the American Consul, on board the ship Rachel for the United States, and arrived at this port October 31, 1840.

The bark was sold by the captain at Callao, in July, 1840, in pursuance of a previous contract, and duly transferred to the purchasers, but the same master remained in command of her after the sale.

On the passage of the vessel out to Valparaiso, some turpentine casks stowed below, as part of her cargo, were burst in heavy weather, and most of the ship's company were sickened by exhalations from it. The libellant, particularly, was seriously affected in his loins and kidneys, voiding blood with his water, and was greatly debilitated in strength, and unable to perform

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duty because of such sickness, and for that cause left the vessel at Valparaiso. He never after had an opportunity to rejoin her. On his return home, he continued feeble, but did such duty during the voyage as his strength permitted. Since his return he has made one voyage to the West Indies, but his general health has continued greatly impaired, and he has been most of the time for that cause out of employ, and at board. He has also been attended by a physician at times, since his return from the Pacific.

Burr & Benedict, for the libellant.

F. B. Outting, for the respondents.

BURRIS, J.—The first point to be considered is the period for which the libellant, under the facts, is entitled to wages. He claims their continuance to the commencement of this suit, because the vessel had not then returned to the United States, and completed the voyage for which he agreed.

The respondents insist that the contract was terminated by the libellant's leaving the vessel in Valparaiso, as he never afterwards sought to rejoin her; or with her sale at Valparaiso, in July, 1840, or at the furthest, on his arrival at this port, October 31, 1840.

The contract of hiring being for a voyage out and home or for a term of eighteen months, was not fulfilled on the part of the ship, either by lapse of the term or the absence of the libellant, unless the respondents prove the failure was owing to the fault of the libellant. He is entitled to compensation conformably to the principle which prevails where the voyage is broken

up abroad by the owners, or the seaman is intentionally left in a foreign port.

I think upon the proofs, there was sufficient reason shown for the libellant's absence from the vessel at Valparaiso; and as he was taken immediately from the ship to the hospital, it is to be presumed he left with the assent or under the direction of the master.

No evidence is given that the master offered him provisions or medicines on board the ship, or afterwards reclaimed him from the hospital or gave him an opportunity to return to the vessel; and as it appears that the ship was sold at Callao in July, immediately after and about the time the libellant was discharged from the hospital at Valparaiso, and was transferred to foreigners, and went directly into their employ, he was not bound, if within his power, to join her or continue in her service. Such sale by the owners terminated the contract on the part of the crew, and they were placed by it, at their option, in the same condition as to their rights and remedies as if they had been discharged from the vessel or her voyage had been wholly abandoned. (*Hindman v. Shaw*, 2 *Peters' Adm. R.* 264; *Emerson v. Howland*, 1 *Mason*, 52; *Moran v. Baudin*, 2 *Peters' Adm. R.* 415; *The Cambridge*, 2 *Hagg.* 243.)

The cases cited recognise the rule of the maritime law, that seamen in case of abandonment abroad or the sale of the vessel, are entitled to compensation by damages; and various methods are indicated for ascertaining and fixing the amount of such damages.

The act of Congress of February 28, 1803, ch. 62, may perhaps be regarded as prescribing the rule of damages when the voyage is broken up in a foreign

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port by the sale of the vessel, but it would not necessarily include the case of a seaman left in a foreign port by the vessel previous to her sale. His rights would be fixed by that abandonment of him by the master, and not by the after sale of the ship.

Although compensation by way of damages against the master or owners for such departures from the contract imputes it to be wrongful in respect to the sailor, yet the common occurrences of commercial business naturally leads all parties to contemplate changes of that character as incident to navigation and trade; and the Courts, accordingly, rarely if ever countenance a demand of vindictive damages therefor as cases of wanton and unjustifiable tort. (*Wolf v. Oder*, 2 *Peters' Adm. R.* 261; *The Elizabeth*, 2 *Dods.* 407, 411.)

The Courts seek rather a fair indemnification of the seaman than the infliction of punishment on the master or owners of the ship.

But indemnity will ordinarily be found in continuing the wages of the seaman to the termination of the voyage, and his return to his home port, or for a time reasonably sufficient for such return, together with repayment of the expenses of his passage, when any have been incurred.

On the other hand, he is to be considered compensated *pro tanto* towards those allowances, by wages earned by him in the *interim*; (2 *Dods.* 411; 2 *Gall.* 56; 3 *Rob.* 92; 3 *Johns.* 518; *Hoyt v. Wildfire*, 9 *Johns.* 138; *Ward v. Ames*, 11 *Johns.* 66; *Sullivan v. Morgan*, 3 *Sumner*, 50;) and such earnings will be credited the owner and deducted from the total amount of wages.

In this case I think the libellant is entitled to wages

up to his arrival in this port, and as to him the voyage is to be regarded terminated at that time. The libel does not demand the three months extra wages provided by the act of February, 1803, because of the sale of the ship, and it is not, therefore, necessary to inquire whether the payment can be enforced when the sale is after the actual connection of the seaman with the vessel is ended.

There is no foundation in the reason of the case, nor do I find any in the authorities for considering the voyage continuing, in respect to time, until the actual return of the ship to the United States.

Had he been brought home by the vessel as soon as he could return from Valparaiso, the contract of the ship would have been ended at her option, although he was in full health and desired to continue with her the full period of time stipulated in the shipping articles; and all he could equitably require of the ship or owners, in his enfeebled condition, was to replace him in his home port without charge, and with the continuance of wages to the time of his return.

There is no fact in proof from which it can be implied that the libellant incurred any expense for his passage home, and no allowance, therefore, can be awarded him other than his wages.

He has given no proof in support of his allegation that the master detained his wearing apparel on board the ship when he left her for the hospital at Valparaiso; and, in the absence of testimony, the presumption is, that he took it ashore with him.

The inference that a sailor's wearing apparel is detained by the ship could never be raised, except in case of his desertion, or being forcibly put ashore, or wrongfully abandoned by the master when ashore.

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The remaining inquiry upon the merits is, whether the libellant is entitled to be maintained at his home port during the continuance of the malady contracted on the voyage, and cured at the expense of the ship or owners.

The doctrine of the maritime law, declared in the ordinances, edicts and decisions of commercial nations is, that a mariner falling sick during a voyage, or hurt in the performance of his duty on ship-board, is to be cured at the expense of the ship. (*Abbott*, 146, note 1; 2 *Browne Civ. and Adm. Law*, 182; *Curtis' Rights and Duties of Seamen*, 106 to 110, and the authorities there cited; 3 *Kent*, 184, 185.)

The libellant insists that both public policy and the plain text of the laws of the sea give him a fixed right to be treated and maintained at the charge of the respondents whilst his disability remains. A like position was taken in the first Circuit in the case of *Reed v. Camfield*.

Judge Story felt the force of the interrogatory which naturally arises from this rule. Is the obligation imposed a positive one to *cure* the seaman? And does it stand in force so long as the illness or the wound incurred on ship board is unhealed? And in my humble judgment his decision in the cause fails to supply a clear and satisfactory explication of the difficulty.

His answer is, that the law embodies in its very formula the limit of the liability. The seaman is to be cured at the expense of the ship of the sickness or injury sustained in the ship's service; and when the cure is *completed*, at least so far as ordinary medical means extend, the owners are freed from all other liability. (*Reed v. Camfield*, 1 *Sumner*, 202.)

This statement indicates no limitation to the obliga-

tion of the owner short of a complete cure, unless it may be implied that he does not become responsible for inefficient efforts to cure, when ordinary medical means are used, and fail to accomplish it.

But it would seem to result from the terms in which the doctrine is stated, that the owner remains chargeable with the expenses sustained by a seaman in employing medical means to effect a cure, so long as the necessity for such expenses abides. Certainly the Court in that case points out no restriction or qualification to such absolute obligation.

The doctrine is supposed to be founded in the laws of Oleron, arts. 6 and 7, and to be incorporated into the maritime codes of most commercial nations. (*Pardessus' Collection of Maritime Laws*, vols. 1, 2, 3; *Oleirac us et coutumes*, 5 *Pothier*, 376, art. 188, 189; 2 *Browne Civ. and Adm. Law*, 182.)

The French Ordinance of Marine and Code du Commerce adopt the rule in the same general language; the seaman is paid his wages, and tended and nursed at the expense of the ship when he falls sick during the voyage. (*Ord. Mar.* art. 11; *Code de Comm.* liv. 2, tit. 5, art. 262.)

It is manifest that a construction of this law, which should charge owners of vessels with the support of sick crews without limitation of time, would be most oppressive in its consequences, if it did not also tend to impair to a serious degree the maintenance and prosperity of a merchant marine, and thus become a public evil.

The ship and owner would be rendered liable for the support of sick seamen out of each successive crew and voyage, who would be made pensioners upon the owner so long as their infirmities remain uncured.

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This rule does not embody in itself any restriction or limitation of liability short of the consummation of a cure, and the case of *Reed v. Camfield*, in reposing upon the *formula* of the law as the measure of the owner's responsibility, would seem to sanction and adopt it according to its natural bearing. All from which the owner is exempted by that doctrine is a liability to sailors for *consequential* damages to them resulting from their sicknesses or bodily wounds; but its apparent tenor is to demonstrate that an *uncured* malady or wound is not of that character, and the inference accordingly is that the owner, after the voyage has been completed, is yet subject to charges for its treatment until a full *cure* is effected.

It is not necessary to discuss the application of the rule to special classes of cases nor to impugn the justice of the decision in *Reed v. Camfield* upon the circumstances of that case. But I cannot subscribe to the position that seamen can exact any remuneration from owners of a ship after a voyage is completed, and their connection with the vessel has ceased, in satisfaction of expenses for their support or medical treatment incurred subsequent to that time.

The privilege of seamen, in distinction from the rights of others hired for services, (*Pothier's Cont. Louage de Matelots*, art. 189,) is to have wages so long as they are bound to the ship, although disabled from performing any services, and a continuance of their right to maintenance and cure is justly concurrent with that privilege, and in principle ought not to extend beyond it.

Pothier vindicates the allowance of these extraordinary privileges upon the policy of encouraging men to

embrace that profession, and also because having to run the risk of losing all wages in case of the loss of the vessel and freight by shipwreck, it is just, in recompense of such risk, that their pay should continue during periods they may be prevented rendering services by reason of sickness or disabilities incurred on board, being a *vis major* in this respect. (5 *Pothier*, 377, *art.* 189.)

And it is to be remarked that this learned jurist suggests no direct limitation to the provision for sickness, and that his language might be taken to imply that the duration of wages is to be coeval with the continuance of the disability. His words are: "L'ordonnance conserve aux matelots leur loyers *pendant le temps de leur maladie*, lorsqu' e'tant au service du navire ils sont tombes malades pendant le cours du voyage." In my opinion, however, this position imports that the treatment for sickness stands on the like footing, and is recoverable by the seamen for the same period as wages, it being a part of their necessary nourishment during the term of their hiring.

The terms of the ordinance of *Louis XIV.*, *art.* 11, unite the provision for wages and sickness, and apply the recompense alike to both: "Le matelot qui tombera malade pendant le voyage, sera payé de ses loyers et pansé aux depens du navire."

Valin, in his commentary on the article, reasons theoretically that it would be just that seamen wounded in combating for the defence of the vessel or cargo, if maimed or disabled for life, should be supported during life at the expense of the ship and cargo; but he says a burthen of the kind would check commerce, and besides, that pensions or recompenses of that character

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should not be thrown on individuals, but be bestowed by governments. (1 *Valin*, 722.) This sentiment had relation to military services, and no way favors the doctrine that seamen in commercial employment alone acquire a right against individual ship-owners to any support or cure after the term of their employment is ended.

Cleirac plainly limits the privilege in stating that seamen sent ashore to the hospital are to be maintained there at the expense of the ship, *whilst the voyage endures*. (*Cleirac, us et cout.* 17, c.) Thus, by implication at least, recognising the liability in respect to the case of sick seamen, to be no further in extent of time than payment of wages.

Boulay Paty cites an *arrêt* of the Court of Cassation, giving to the provision in the Code, that the sick seaman shall be treated and cured at the expense of the ship, (*Code du Commerce, art.* 262,) the qualification, "whilst he is on the ship, or employed in its service." (1 *Boulay Paty*, 202.)

This, in my opinion, is the sensible limitation of the rule, and enforced to that extent, it affords a liberal and just encouragement to seamen, without imposing an indefinite burthen on ship-owners.

To give to the provision the full effect of the terms in which it is expressed, would be to cast upon ship-owners the charge of all seamen for their lives, who fell sick, or were injured at any time in the employment of their vessel. A liability so hazardous would be oppressive and disastrous to navigation and trade.

I hold that the right of the libellant to wages, and his right to support or medical treatment at the expense of the respondents, supposing his cure not

then completed, ended on his arrival in New-York, October 31, 1840, and that his demand for further compensation in that behalf must be denied.

Several formal objections were taken by the respondents to the correctness and sufficiency of the pleadings and proceedings on the part of the libellant. They do not appear to the Court of a character to affect the merits or the form of the decree asked for.

It is objected, that no order is prayed against Swasey, one of the respondents, and that accordingly he cannot be charged, in any respect, as the decree must be in correspondence with the allegations and prayer of the libel.

The name of this respondent is written in the body of the libel but is not repeated in the prayer. The libellant, however, asks for a decree conformably to the case made by him, and it was no way essential that he should pray it specifically against each of the respondents by name. At most the error is merely formal, and can be rectified by the Court at hearing, if important to give consistency to the minutes, or to render the ultimate act of the Court formally correct. (*Dunlap Adm. Pr.* 283; *Ibid.* 211; *Betts' Pr.* 57, 59; *Judiciary Act*, Sept. 24, 1799, § 24.) If the objection was any way important to the interests of the defence, and had been made by special exception before issue upon the merits, and the Court had exacted in the structure of the pleading all the provisions required by Courts of common law, or in England by the Ecclesiastical Courts, the act of Congress authorizing amendments and the practice of this Court, would enable the party committing the error to have it rectified *instantly* at any time before final decree rendered and the close of the term.

Hovitt v. Clarke.

The death of one of the respondents since the suit was commenced cannot affect the proceedings. It would be irregular at law to raise the objection on proof at the hearing, and in this Court no advantage could be taken of it by any mode of pleading, when the cause of action survives. (*Cir. Court Rules*, 56-59.) All that the practice of the Court would require would be the suggestion of the fact on the proceedings, or *apud acta*, and that ordinarily must be made by the parties with whom the death has occurred, and not by the opposite ones. There is accordingly no deficiency shown in the pleadings which can prevent or delay judgment for the libellant.

I think the libellant is entitled to recover full wages up to the time of his arrival at this port, and interest upon the sum which shall be reported due him from the time his suit was commenced. He had made no previous demand on the respondents, and remained here from 1840 without notice to them of his existence, or that he had any claim against the ship or them for wages.

His excuse, that he was waiting the return of the ship, ought not to avail him to impose interest on the respondents, without proof that they knew of his services, and that wages were in arrear to him.

If his action was defended under the expectation that he could subject them to the expense of his support, so long as he remained unable to do duty and maintain himself, that hope of enhancing the amount of his recovery affords no reason for charging them with interest on a concealed demand, and one not shown by the proofs that the respondents had any means of ascertaining otherwise than by evidence in the libellant's possession.

The Bark Lotty.

The decree will be that the libellant recover his wages, according to his contract, from the time he entered on board the vessel until his return to New-York, with interest since the commencement of this suit, deducting all payments and advances. He will also recover his costs to be taxed.

The usual reference will be taken to ascertain and report the balance of wages due according to those directions

THE BARK LOTTY.

Admiralty has jurisdiction in a cause of collision between vessels when the injury is received in a slip where the tide ebbs and flows between piers or wharves in this port.

The master of the vessel on board at the time is responsible for the wrongful act of the vessel, although it was consequential to the neglect or misfeasance of a licensed pilot in securing her improperly to a wharf.

It is an act of neglect and unsafe to leave a vessel in the winter season during the night, at a wharf on the north side of the city, moored with only a single $\frac{3}{4}$ inch chain.

It is gross and culpable neglect to suffer her to remain in that situation in a high and increasing wind, augmented to a violent gale, in which her fastenings parted.

The authority of a licensed pilot in securing a vessel in her berth is not paramount to that of her master; the latter is deemed in full command, and the acts of the pilot are regarded as done with the direction or approval of the master.

It is not a *vis major* which excuses a master, that his vessel broke from her fastenings and caused damages to another in a tempest of wind, when he had warning and sufficient opportunity to protect her from that hazard.

A foreign master who understands and speaks English imperfectly, will not be charged upon his declarations or admissions in that language, without clear proof that he well understood the meaning of what is addressed to him and that used by him in reply.

The Bark Lotty.

THE vessel is prosecuted for damages occasioned by her driving, with great violence, against the steamboat *Independence*, in one of the slips of this harbor.

In the afternoon of the 15th of December, 1845, the bark, a Swedish vessel, arrived in this port, and was moored by the pilot, who brought her in, at pier No. 2, North river, on the south side of the wharf. The steamboat lay on the north side of the opposite wharf of the same slip.

She was fastened to the wharf fore and aft by a single chain of only $\frac{7}{8}$ inch dimension, and it was admitted at the hearing by the counsel of the claimant and respondent, that she was not secured with a strength of fastening required by the usages of the port, in her position at that season of the year, on the north side of the harbor.

A gale of wind of extreme violence from the north-west, set in early that evening, and continued through the night, and at five o'clock the next morning, when the master and crew were taking measures to carry out more fastenings further to secure the bark, the forward chain parted, and the bark was carried round by the wind, and driven violently stem on against the steamboat, breaking up her wheel-house and doing great damage, before, by the most active exertions of the crews of the two vessels and others aiding, she could be hauled off.

O. Livingston, for libellant.

B. Blunt, for claimant.

BERRS, J.—This action has been contested essentially upon two points. The respondents contend, first, that

this Court has no jurisdiction of cases of collision occurring at the wharves and piers of the city; and secondly, that the master and bark are exonerated from responsibility, the vessel having been placed and left in that condition by a licensed pilot, who navigated her into the harbor and moored her.

The collision causing the damage was a maritime trespass, committed upon tide waters, and as such is, upon general principles, within the jurisdiction of the Admiralty. (10 *Wheat.* 473.) It takes cognizance of cases of collision within harbors, and upon rivers, *infra corpus comitatus*, where the tide ebbs and flows. (8 *Law Rep.* 275, Wayne, J.) The doctrine has been declared in numerous cases in this Court, and I am not aware of any accredited decision in the United States to the contrary; and no distinction is noted in the authorities restricting the jurisdiction over waters in harbors, not flowing into and out of slips, basins, &c. (*Laws of Oleron*, art. 14; 2 *Peters' Adm.* 313; 2 *Gall.* 400; 5 *Law Rep.* 200; 8 *Law Rep.* 275; *Abbott*, 99, *note*; *Bee R.* 553.) I shall accordingly pronounce in favor of the jurisdiction in this case.

Upon the second point there is no foundation for the idea that the authority or responsibility of the master or owners of the vessel was any way lessened by the act of the pilot in mooring her. That of the owners would have remained entire had the collision happened when the vessel was under way under the direction of the pilot, although the command of the master and his personal responsibility may, perhaps, be suspended for the time. (*Abbott*, 161, *note*; *Jacobsen*, 125; *Curtis' Merchant Seamen*, 195, 196, *notes*; 4 *Dall.* 206; 9 *Wend.* 1.)

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But after the vessel was brought safely into port, the authority and responsibility of the master were fully reinstated, and the acts of the pilot in selecting her berth and arranging her moorings must be regarded as directed or adopted by the master. By parity of reason his liability should be the same whilst the pilot is navigating the vessel, when he is not compelled by law to take a pilot. (*Curtis*, 196, *note*.)

I think, accordingly, that it is no matter of defence in this case that the bark was moored by the particular orders of the pilot. No law or port regulation has been shown subjecting the master to the authority of the pilot in respect to the position or fastenings of his vessel after she is brought into port, and consequently the master, equally with his owners, is responsible for damages occasioned through ignorance, negligence or want of due precaution in the pilot in this service.

Although, in the course of the hearing, it was conceded on the part of the claimant and respondent, the evidence had established the fact that the fastenings of the bark were insufficient, and not according to the custom of the port, and the Court accordingly stopped the libellants giving further proof to that point, yet, on the argument, it was insisted that the damage was caused by *vis major*, a sudden and extraordinary tempest, which, in addition to the necessary strain and pressure upon the vessel, had raised masses of boards from the dock and driven them against the rigging, thereby forming a bulwark, which exposed her still more to the violence of the gale, and caused her fastenings to give way.

It is sufficient avoidance of that branch of the defence that the gale commenced early the preceding evening, and augmented throughout the night in violence; and

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accordingly the master was warned in due season of the necessity of active precautions in securing his ship. He neglected strengthening her fastenings for twelve hours, leaving her in almost a hurricane, with only a single and light chain to confine her. Had the disaster occurred in a sudden squall, striking the vessel without premonition, the defence would have a more urgent equity to favor it; but it was palpable negligence to trust his vessel through the night to a tempestuous wind directly straining her off the wharf, where she was held only by a single and slender chain, which the proof shows to have been no more than the slightest fastening used in a like position in calm weather.

The libellants seek also to sustain their action upon the alleged promise of the respondent to pay the damages. The respondent denies making such promise, and also the authority of this Court to take cognizance of verbal contracts of indemnity made after a loss or injury had occurred, if indisputably proved. I do not discuss the question of jurisdiction on this point, because, in my opinion, there is no sufficient proof that the respondent made the alleged agreement.

He is a foreigner, who speaks English very imperfectly. The promise set up is no more than the impression gathered by the master and some of the crew of the steamer, from his reply to a statement made by the master of the steamboat, at a time of considerable agitation and excitement on both sides.

If the declaration was admitted, and the respondent might be regarded acting with reasonable composure at the time, I think the testimony entirely too vague and conjectural to be accepted as proof that he clearly

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comprehended what had been said to him, or that his reply to it was correctly understood.

The decree will be against the vessel for the expenses of repairing the steamboat, no allowance being made for the loss of the trip, and it must be referred to a commissioner to estimate and report the damages pursuant to these directions.

THE STEAMBOAT SWALLOW.

Interest is allowed on liquidated demands in Admiralty the same as at law, and on seamen's wages from the time they are due.

An association of separate owners of several steamboats into a joint concern, to run their vessels upon the Hudson River, and to collect and receive the earnings of the boats in a common fund, out of which the expenses of all the boats are to be paid, is no more than a private co-partnership in a particular business or transaction.

Each member of the association is responsible individually for his acts or contracts in the business of the common concern.

The custom with steamboat owners upon the Hudson River is, to hire masters, pilots and engineers for the season, at a yearly salary, payable in ten equal parts—the season for the purpose being understood to begin with March and end with December.

The master is entitled to recover a proportionate part of the salary when his services do not commence or terminate with the season.

Where a master of a boat who was hired by the owners in that manner for a succession of seasons, and during the period the vessel was chartered by the owner for a term ending on the first of January, and the master continued with her subsequently, without giving proof of any special contract of hiring and beginning actual service on board the first of March, it will be implied that the hiring was for the season according to usage, and that it commenced on the first of January and not the first of March.

The objection that a demand in suit is stale or barred by the statute of limitation, cannot be made without being properly stated in the pleadings.

THE libellant had been master of the steamboat *Swallow* a period of several years. She was a passenger

vessel, owned by the respondents, making regular trips between New-York and Albany.

This action was brought to recover wages alleged to be due him in that capacity, and also for moneys paid by him during the term to other persons on board, and in the service of the vessel. The libel claims wages in arrears in the years 1837, 1841 and 1843.

The answer admits that one month's wages for July, 1837, \$83 33, is due the libellant, and further, that the services were rendered as alleged in the libel, but avers that the wages of the libellant were paid him in full by the respondents for the year 1843. That during the year 1841, the boat was in the employment of the Hudson River Association, who appointed the master on the nomination of the owners, and that his wages for that year are chargeable to the joint funds of the association, and not against the respondents individually. It asserts that the moneys paid to others on board by the libellant were overpayments, and not legally chargeable against the respondents.

The case was argued by

Burr & Benedict, for the libellant, and by

Hoffman, for the claimants.

BERRS, J.—For the one month's wages admitted to be unpaid, there must, of course, be judgment for the libellant. He is also entitled to interest from the time the wages were payable. It is the rule of Admiralty, as well as at law, to allow interest on liquidated claims from the time they are demanded, and on mariners' wages from the time they are due. (*Gunnel v. Skin-*

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ner, 2 Gall. R. 45; *The Elizabeth Frith*, MSS.*) The preponderance of proof clearly is, that the libellant advanced one hundred and fifty dollars for the wages of part of the crew, during the month of July, 1837. This proof is also corroborated by the acts of one of the respondents, who presented the account as rendered by the libellant, to his co-associates in the employment of the boat, and urged its payment, as justly chargeable against them in common. This sum must accordingly be recovered by the libellant, with interest.

The main contestation in the cause has been in relation to the wages of the libellant for the months of January, February and March, 1841, and for two months in the year 1843, in all five months, amounting to \$416 65. This amount the respondents contend they are not individually liable for, if due, but that it is chargeable to the Hudson River Association.

The owners of several steamboats plying upon the Hudson River, of which the Swallow was one, entered into an association or joint arrangement, by which the earnings of the different boats were to be brought into a common fund, out of which the expenses of all the boats were to be paid by the association. Each owner was to equip and furnish his particular boat, and engage his crew, and nominate the master of the vessel, but the appointment of the master was to be made by the association.

The Swallow was employed for a time under that engagement; but in the year 1841, her owners chartered or hired her to the association for a fixed price. The object was to reserve her as a supernumerary boat

* Since reported, 1 Blatch. & Hom. 195.

in the common business, and only run her in the place of any boat in the association that might happen to be disabled. In such case she was to be manned and navigated by the company of the disabled boat.

This agreement was signed and entered into April 6th, 1841. When it went into operation, the libellant was in command of the Swallow, as he had been previously, (but not by appointment of the association,) and then retired from the command.

The proofs show the uniform usage with owners of the Hudson River boats had been to hire their masters for the season, at a yearly salary, which was ordinarily paid in ten equal instalments, covering the period the boats were in service or preparing for it, or being laid up, and considered as beginning with March and ending with December, but not unfrequently the amount was divided into equal monthly payments.

It is clear, upon the evidence, that the libellant was entitled to \$1,000, wages for the season, and at that rate for any period less than a season, when his services did not commence or terminate with it; and that the amount payable to him has not been satisfied by the respondents or the Hudson River Association.

The main question in dispute is, whether his resort must be to the association, or if he can hold the owners of the boat responsible for the balance unpaid. So far as that question applies to the wages for 1843, the allegation of the respondents, that the full wages for that year have been paid, necessarily makes part of the defence to be considered.

If the association had been composed of strangers to the respondents, wholly independent of any interest or influence in it on their part, that fact would afford no

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legal exemption from their individual liability to the master. He was hired by them as owners of the boat, and the services of the boat for the association nominally, was in effect to the benefit of the owners individually. They received from the common fund, created by the earnings of the associated boats, an equivalent for the earnings of their own. It was only a different method of collecting her earnings and defraying the charges upon them; or, to represent the operation in mercantile language, it was placing the freights of the vessel in the hands of trustees for the owners, who were to discharge the obligations of the vessel to the crew, and pay the surplus to her owners.

Should the holder of freight refuse or neglect to pay the wages of the master, his resort to his owners therefor could in no way be prevented or impeded, because of the manner in which they employed the vessel. If they let her to a third party *in solido*, she still remains answerable for her owners' engagements in regard to her fittings or navigation. (2 *Dods*. 500; *Gilp*. 592; *Cowp*. 636.)

But there is a higher principle in the case which supplants the defence set up by the respondents. As owners of the boat, they composed a part of the association. It was, in relation to its operation and purposes, a private copartnership, and partners can never discharge themselves of liability for their individual debts by showing that the copartnership had assumed to pay them, and was supplied with funds for the purpose.

The individual liability is not merged in that of a copartnership. The questions mooted in respect to a personal or associate responsibility to creditors relate to liabilities imposed upon the whole by acts of separate

members, and not to the exemption of individual members from responsibility for their own acts, because a common obligation may also rest on others. (3 *Kent Com.* 24, 32; *Williams v. Bank of Michigan*, 7 *Wend. R.* 542; *Collyer on Partnership*, 625.)

The ratification of the appointment of the libellant as master of the boat by the association, does not affect his legal relation to the owners. Whether it gives an additional security against the associates conjointly, need not be considered, but clearly the owners who made the contract with him, and who had the benefit of his services, cannot exonerate themselves from paying the agreed wages, by showing that as to themselves there was an equity in his securing payment from their associates, and out of the joint fund.

The disposition of that fund must be regulated between the common proprietors, and the respondents must look to their own trustees for indemnity against any injury they sustain from an improper application or withholding of their mutual funds.

The owners deny there is a balance of wages due for 1843. The charter of the boat terminated with the year 1841, and the Hudson River Association has run no boats on their joint account since that date. The owners insist she did not come back to their particular possession and use until March, 1842, and that the hiring of the libellant by the year commenced at that period.

It is shown that he received one thousand dollars during the year 1842 and early in 1843, and the argument is, that a year's wages, from March, 1842, to March, 1843, was thereby satisfied and discharged.

The libellant was appointed by the respondents in

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writing, master of the boat, in 1837. That appointment had not been revoked, and after the special hiring of the boat in 1841 to the association terminated, the libellant resumed the command of her, under the respondents alone.

The libellant sailed her from the opening of the season in 1842, for the benefit of and on the hiring of the respondents. They give no proof that a different bargain was made with him for that service, and the implication that it was rendered upon the same terms with his previous employment, amounts to sufficient proof in his favor of the fact. There is no direct proof that the agreement with the master for 1842 was for the running season; but the notorious and universal usage on the Hudson River, and with the boats owned by this association was, that masters, pilots and engineers are hired and paid by the year, from January to January. And it is strongly corroborative of the presumption that the respondents recognised the custom in this instance and acted in conformity to it; that the engineer of the boat, this same period, from January, 1842, to January, 1843, was hired and paid by stated salary.

In May, 1843, fifty dollars were paid the libellant, in full for the balance of his wages for 1842. The cash-book of the boat was produced by the respondents to show that the libellant's wages were there credited at one thousand dollars, or one hundred dollars per month, beginning on the first of March. This book was not kept by the master, nor is it proved he had any knowledge of the terms of that entry. Such *ex parte* entry in the respondents' books is not adequate evidence to support the defence. It certainly can avail them no

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further than the receipt of May, 1843, drawn and signed by the master, stating that the money thus paid was applicable to his wages for 1842, can be made to support his claim.

On the facts in proof, the libellant, in my opinion, was entitled to wages from January 1st instead of March 1st, 1842, to January 1st, 1843, leaving a balance in his favor still unpaid.

The testimony is not distinct as to the time the libellant remained in command and attached to the Swallow in 1841. I shall assume that he left her on the execution of the charter-party, and take that date to be April 1st, 1841, as it was proved that the arrangement was made before the contract was signed. He will, accordingly, be entitled to one hundred dollars arrears of wages in 1841, two months wages in 1843, and one month in 1837. The credit for payments made for the boat in July, 1837, and claimed by the libellant, is twenty dollars to Bates, the mail clerk; forty dollars to Lockwood, the second engineer; to ten firemen forty dollars, and ten deck hands fifty dollars—one hundred and fifty dollars.

It is now denied that the libellant had authority to hire those men, or that he can charge the payments made them against the respondents. But I think, after rendering these demands to the association as being proper charges against the boat, and attempting to obtain their payment with interest, the respondents are precluded denying their obligation to satisfy them.

The above statement of the claims varies a few dollars from the demand made in the libel, but I do not think it proper to order a reference on a difference of so small an amount.

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I accordingly decree that the libellant recover against the respondents \$150, with interest from August 1st, 1837; \$83 33, with interest from January 1st, 1838; \$209 99, with interest from January 1st, 1842, and \$166 66, with interest from January 1st, 1844, together with costs to be taxed.

The demand of payment of wages should be equitably implied to have been made at the close of each year's services, and that interest was due from the period the advances were made by the libellant for the respondents, and interest be computed accordingly. (7 *Wendell R.* 178; 15 *Johns. R.* 409; 2 *Nott & McCord*, 493; 7 *Wendell*, 109.)

The staleness of the claim for arrears due in 1837, and the expiration of more than six years since those payments, create no bar to the action. Independent of the state of the pleadings, which would exclude those defences, it is proved that demand of payment was made by the libellant upon the respondents in 1842.

Decree for the libellant according to the above directions.

THE SHIP PANAMA.

A bottomry bond, executed by the master of a ship as *master*, if he be at the time owner, also, will impart to the holder the same rights and privileges as if given in the character of owner.

An agent or broker who purchases a vessel for his principal, at the same time lending him money with which to pay the price, and taking the bill of sale in his own name to secure the repayment of the loan and interest together with his commissions on the purchase, is mortgagee, and not owner of the vessel.

The owner of a ship may bottomry her abroad to secure a loan of money, or his personal liabilities for the ship or voyage, provided the debt be put at risk, without regard to the necessity of the ship, or his inability to obtain credit or supplies by other means, or the receipt of the consideration before the ship went to sea. It is not necessary to the validity of a bottomry that the loan or supplies shall have been already received when the bond is executed, if the credit was upon the faith that a bottomry security should be given.

A bottomry of a ship in a foreign port by her owner is valid, although a part of the loan for which it is given consists of a bill of exchange drawn by the bottomry lender on the home port of the ship.

The credit of the bottomry lender, given in aid of the ship or owner in a foreign port, is a sufficient consideration to support a bottomry security. But a Court of Admiralty may call for proof that such credit or liabilities had been actually satisfied by the lender before decreeing an enforcement of the bottomry.

When the owner and mortgagee of a ship both appear and file answers to the libel of a bottomry holder, it is competent for each to claim in his answer or by a separate petition, that the proceeds of the vessel, after satisfaction of the bottomry security, be paid to him.

On such mode of proceeding the Court may at its discretion adjudge prospectively between the contestants the method of distribution of the avails of the ship, or may defer the decision until her proceeds are paid into the registry; and may, also, if the case is difficult or important, direct the parties to litigate their claims to the fund by formal suit.

Whatever mode of procedure is pursued, a party proved to be a mortgagee, after admitting in his answer to the original action that the bottomry security is valid and consenting to a decree of sale of the ship under it, cannot set up a title to the ship in himself as absolute owner and not mortgagee, in bar of the claim of the bottomry borrower to a share in the remnants remaining in Court.

In such collateral proceeding the owner of the ship may defeat the claim of a

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mortgagee to such remnants by proof that the mortgage was given on an *onerosa* consideration.

But it is not *unary* for a broker or agent to charge the usual and customary commissions for his services in purchasing a ship, and also to take legal interest on his own moneys advanced towards the purchase, unless it be proved that the commissions were intended by the parties as a means and cover for reserving more than legal interest upon the loan.

Quere. Whether the Court, in disposing of remnants in the registry, cannot take cognizance of other claims thereto, than those having a lien upon the vessel, or being of a maritime character?

Damages sustained by a charterer of a ship by a breach of the charter contract in the loss or delay of his voyage, through the negligence or fault of the owner, are a lien upon the vessel; and if a mortgagee satisfies the demand and takes an assignment of the claim, he is entitled to come in upon remnants in Court for repayment.

THE controversy in this action is upon a bottomry bond, and came before the Court in two aspects. The owner of the ship and a mortgagee intervened, and filed answers to the libel, and each claimed, as against the other, a right to the remnants and surplus remaining in the registry after satisfaction of the bottomry bond in suit. Separate petitions were also filed by them for such remnants. The owner also contested the validity of the bottomry. The mortgagee admitted it, and consented to a decree to enforce it.

The main contestation was in relation to the remnants in Court.

The owner contended that the mortgagee had no title upon which to found a claim to those remnants; that his mortgage debt was void for usury, and that the other items of his demand were not liens upon the vessel or her proceeds, nor were they of a maritime character.

The mortgagee contended that the legal ownership of the vessel was vested in him, and not in his co-claimant, and that accordingly the latter had no standing in Court in relation to that fund.

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Both branches of the cause were brought to hearing the same term, and were argued by the same counsel.

The essential facts of the case are sufficiently stated in the opinion of the Court.

Ogden Hoffman and Barret, for the bottomry holder.

John Anthon, for the owner.

F. B. Cutting, for the mortgagee.

BURRIS, J.—This was a suit upon a bottomry bond to the libellant, executed at Hull, England, May 3, 1845, by the claimant Cameron, master of the ship. The libel avers that it was executed by him in his capacity of owner as well as master of the ship, and that the loan secured by the bottomry was duly made and paid to him.

The answer admits the claimant was conditional owner at the time, but alleges he gave the bottomry as master only. It denies that the sum named in the bond had been advanced by the libellant when the bottomry was given, or that it is now payable, and alleges that a large portion of the debt was created after the bottomry was given, and the vessel had gone to sea.

It was stipulated in writing between the proctors of the parties, that work and materials were furnished the ship at the request of Cameron, and that the amount charged therefor in the account furnished by the libellant was paid by the libellant, and composes part of the bottomry debt. The other claimant, Quincy, denies that Cameron was owner of the ship, and avers

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that title to the ship was vested in him, (Quincy,) at the time the bottomry was executed, and that Cameron was to become entitled to the ownership only on repayment of the purchase-money advanced by him, Quincy, with commissions, &c.

This branch of the case respecting the legal ownership of the ship was not in contestation on the hearing before the Court, and the case is accordingly to be disposed of in its present posture, upon the assumption that Cameron was legal owner as well as master, when the bottomry bond was executed.

The ground is, however, taken on the argument, that Cameron assumed in the bond, to act in the capacity of master, and that it was accepted by the bottomry creditor as given by the master alone, and accordingly that the transaction must now be considered an hypothecation by a master, and subject to the rules of law applicable to that particular security.

The general principle with respect to a contracting party is, that however he may describe himself or his powers, his contract will have effect according to his actual authority and right in the subject matter, when no specific reserve or restriction is expressed, the obligee being entitled to the full benefit of the stipulations in his favor, so far as the obligor is able to fulfil them. (*Welsh v. Usher*, 2 *Hill*, 168.)

This benefit may be secured by way of estoppel. When the party making an engagement or representation has no capacity at the time to perform it, and afterwards acquires the ability, he and his representatives will be entopped denying the full force and effect of his undertaking. (*Com. Dig. Grant*; *Gough v. Bell*, 1 *N. J.* 156; 4 *Kent*, 98. 24 *Pick. R.* 324.) This doctrine,

more familiar in the interpretation and force of real covenants and contracts than in those connected with the personalty, still has a common affinity in principle in relation to both, and may, if necessary, be invoked to uphold a charge upon a ship by maritime lien or mortgage, no less than transfers or encumbrances of real estate; restricted possibly in both descriptions of grant, to those which are positive and assuring, and not to mere releases and acquittances. (11 *Wend.* 110; 14 *Johns.* 193, *McCracken v. Wright*; 1 *Coven.* 616; *Co. Litt.* 265, b. 6, § 346.) Still, if in strictness of legal rules a party assuming a right to act as if he had a particular capacity, which does not belong to him at the time, may not be bound in that capacity if he afterwards acquires it, yet Admiralty, exercising, in some measure, the powers of a Court of equity, may hold his act or obligation shall have operation as in cases of equity relief, according to the condition of parties at the time the decree is rendered. (9 *Paige*, 244; 1 *Wheat.* 178.)

In my opinion, neither in equity or under the stricter rules of law will a party who gives a bottomry upon a ship in the name and character of master, and was at the time, or afterwards becomes owner of the ship, be permitted to restrict the rights of the bottomry holder at the time of its enforcement merely to those conferred by the authority of a ship-master. He takes all the benefits under it which would have accrued had it been avowedly executed by the owner. Those who come in as subsequent purchasers under the same owner, or holders of claims, or liens, or encumbrances posterior in law to the bottomry security, have no privileges in this respect higher than those of the owner.

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In this case, in executing the bottomry and hypothecation, Cameron described himself, and professed to contract as *master of the ship*. It now appears upon his answer, and also on the proofs, that he was at the time absolute owner, subject only to an outstanding mortgage to Quincy, the other claimant.

The holder of the hypothecation is accordingly entitled to every advantage derivable from the fact that it was made by one possessing not solely the authority of agent, but that of principal also.

This point being established, the case stands relieved of all questions raised as to the necessity or fitness of items charged as supplies or reparations to the ship, and made part of the bottomry debt, because the owner is held competent to raise money, or secure his debts by a bottomry on his vessel, without regard to the necessity of the ship, or his inability to procure funds by other means. (*The Smilax*, 2 *Peters' Adm.* 295, note; *The Draco*, 2 *Sumn.* 157; *Sloop Mary*, 1 *Paine*, 671.)

It is plain, upon the authorities, that the objection to the validity of this security, for want of adequate power in the bottomry giver so to hypothecate the ship, cannot be sustained. (*The Barber*, 4 *Rob.* 7; *The Duke of Bedford*, 2 *Hagg.* 294.)

Indeed, the bearing of the cases is, that a bottomry by a master, in presence of the owner, is only valid by reason of his implied assent to it, (1 *Wheat*, 96; 1 *Paine*, 671; *Gilpin*, 457,) unless it be given in a case of stringent necessity, and the owner withholds his assent unreasonably. (3 *Kent*, 172.) Nor do I find any authority or principle of law in support of the argument that this bottomry can only stand

upon the rightful power of the master, as such, to execute it.

The ancient sea laws regard the master a substitute only for the owner in his absence. They show that he generally has no authority to bottomry his ship in her home port, because the owner is to be presumed present there. (*Consolato del Mare*, (Boucher,) ch. 239, pl. 694.) Emerigon refers to various ordinances of maritime states to the same effect. (*Contrat a la Gross*, ch. 3, § 3; *Jacobson*, 363.) The authority in Cameron, in the capacity of master alone, to charge his ship by way of bottomry in a foreign port being irrefragable, it would seem reasonably to follow, that it would be left to his judgment to determine what her necessities, at the time, for the completion of the voyage, might be. Admitting, however, that the Courts will scan his acts in the character of master, and determine whether he proceeded prudently in view of the rights of those having interests attached to the ship, by admitting within the bottomry security all the particulars which made up the amount of the debt covered by it, and may also do the same, notwithstanding his legal ownership of the vessel when the equitable and substantial interest is in third parties, leaving no more than a conditional or trust title in him, yet in either such case the secondary or trust interests sought to be protected must be brought forward distinctly in the pleadings by the parties entitled to enforce them.

But the rights of parties, in that aspect of the case, are not before the Court in this issue between the libellant and the claimant, Cameron. All that is involved in this branch of this controversy is the question of the relative rights of the bottomry creditor and debtor

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when the dealing for the hypothecation is directly with the ship-owner.

The stipulation signed in the cause, as also the admission of Cameron after payment of the bottomry was demanded, proves that the debt due by him to the libellant, and intended to be embraced within the bottomry, was £1,325 11 11, sterling—being £125 11 11 beyond the condition of the bond.

This fact gives occasion to one of the objections preferred against the validity of the bond to its full extent. It is contended, that when the bond was executed, but a small part of the debt was due the libellant, and that he is limited in his relief on the bottomry to the amount of the indebtedment payable at that time.

The ship came into Hull in a disabled state, consigned to the libellant by Cameron. Her repairs and supplies were obtained on the credit of the libellant, part of the bills for which had been rendered and paid when the bond was given, and the ship sailed, and the residue came in and were paid subsequently, but before the bond became absolute.

There were also advances of money made by the libellant directly to the master, partly cash in hand and in part by a bill at sight on a house in New-York, which was duly honored. It is no way a vital ingredient to a bottomry given by a master that the advances it secures shall precede its execution, even when it purports to protect a direct loan or to secure existing debts, if the credit in either case was upon the faith that a bottomry should be given. (3 *Dods*. 273; *The Virginia*, 8 *Peters' R.* 552.) Nor, in my opinion, is its validity affected if it be given after the ship has sailed, pro-

vided the debt is at risk. (*Conrad v. Atlantic Ins. Co.*, 1 *Peters' R.* 386.) As in this case, the hypothecation was made by the *owner* himself, there would seem to be no mode of avoiding it left him except to show a total want or failure of consideration to support it. The liabilities of the libellant for the vessel and owner, when the bond was taken, would be an adequate consideration upon which to found a bottomry, although a Court of Admiralty would doubtless call for proofs that the liabilities had been extinguished by actual payment before it would decree the enforcement of the bond, even on the defence of the owner; and especially so, if it is opposed by other creditors, whose prior liens on the ship or freight might be postponed by the bottomry. The presumption that the dealing with the libellant for this credit was, in its inception, on the understanding that it should be secured by bottomry, is strongly corroborated by the acknowledgment of the master after the bond became payable, that he had given it, and that the whole amount named in it was owing by him.

Nevertheless, it was strenuously pressed upon the argument, in favor of the owner, (Cameron,) that a large part of the demand now sought to be recovered arose upon liabilities or transactions between him and the libellant, subsequent to the departure of the ship and the execution of the bottomry, and are not proper subjects for bottomry security.

I do not go into an examination of these allegations, nor consider whether it is competent to an owner to invalidate his personal contract by objections of that character, because the stipulation on file admits the whole balance claimed by the libellant to be justly due,

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and, as before suggested, the same admission was orally made to the libellant before this suit was brought.

The Court, seeing in the transaction between the parties that this debt may well be a legal foundation for a bottomry security, will not impeach it, it having been given by the owner himself, upon any presumptions or even positive evidence, which might have availed him had the bottomry been executed by the master in his absence and without his direction.

Upon this state of the pleadings and proofs a decree must be rendered in favor of the libellant, affirming the validity of the bond, and directing the whole amount, with the marine interest reserved, to be paid, and that the ship and her freight be condemned therefor, as against the owner and claimant, Cameron; subject, however, to such decree as may be rendered on the defence interposed in the case on the part of the other claimant, Quincy, to the effect that Cameron had no authority to hypothecate the ship in his capacity of owner, further than he could legally charge her in the character of master, as against the claimant, Quincy.

Interest also will be computed on the loan and marine interest, from the day they became payable to this decree, with costs to be taxed.

BERRS, J.—The claimant, Quincy, in his answer, interposes no objection to the validity of the hypothecation of the ship by Cameron, nor to the sale of the vessel under it; and admits, so far as he is concerned, that the libellant is entitled to a decree therefor; but he claims that in the distribution of the proceeds of the ship in Court, his demand is prior in legal right to that of Cameron.

The Court having decided that the bond was operative and good for its amount as against Cameron, it remains to be settled between these two claimants, after the satisfaction of the libellant's debt out of the fund in Court, which of them is entitled to receive the surplus.

Quincy proves a bill of sale, executed upon the purchase of the ship, on the 12th of November, 1844, vesting the nominal title and ownership in him. Other documents and evidence produced in the case, however, show that his right, under the bill of sale, was only that of mortgagee, and that the actual ownership belonged to Cameron. There is, therefore, no foundation for the argument, that he can come in and claim the fund in the character of owner of the ship. He purchased her as agent for Cameron and for him, and he took possession of her as owner. This might, perhaps, make his ownership complete without a bill of sale or other paper title. (3 *Kent*, 129; *Abbott*, 12, 1829.) But the pleadings and proofs in the case show that Quincy never claimed any title or interest in the ship other than that of mortgagee.

For Cameron it is contended, that the Court has no jurisdiction over that branch of the subject, because the remedy of Quincy, in his character of constructive mortgagee, must be pursued in the State tribunals.

This Court being rightfully in possession of the funds representing the ship arrested, must necessarily, as incident to that possession, have power to decide who is entitled to withdraw them from the Registry. (*Andrews v. Wall et al.*, 3 *How. R.* 568.)

It may, undoubtedly, in cases of great difficulty, retain the funds until the adversary claimants shall have

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litigated their rights to it by direct suit in this Court, or some other proper forum; but this must be matter of discretion, and depending upon the nature of the adversary interests. (2 *Gall.* 483; *Gilp.* 185; 3 *Peters' R.* 675; 3 *Hagg. R.* 129.) Ordinarily the Court hears the case upon summary petition or motion, and pays out or restores the remnants and surpluses according to the right of parties so established before it. (*Betts' Pr.* 119.) Outstanding liens of any description on a vessel, may be recognised and satisfied out of her proceeds, so far as they suffice, when she has been condemned in Admiralty upon prior liens of a maritime character. (*Abbott*, 112, 116, and note; *The Packet*, 3 *Mason*, 253; *The John*, 3 *Rob.* 288; *The Ship New-Jersey*, 1 *Peters' Adm. R.* 233; *Brckett v. The Hercules*, *Gilp.* 184; *Harper v. New Brig*, *Ibid.* 586.)

The jurisdiction of the Court over the subject matter being clear, no reason is discerned why the relief is not equally applicable to cases where no liens exist. The Court must exercise that jurisdiction in every case, and must decide the legal ownership of the fund before an order to pay it from the Registry will be given. (*Gilp.* 536.) But there is no necessity that the order should act at once upon the entire fund; it may be distributed in parts according to the rightful claims of petitioners; and it would seem to be of no moment, if the demand is liquidated and ascertained to be payable by the owner of the remnants, whether or not it is suable in Admiralty against the vessel or her owner.

This Court has, on several occasions, declared that parties entitled to sue in Admiralty for the recovery of their demands, may come in by petition upon the footing of such right, and be paid out of remnants in the

Registry, although they possess no lien upon the property out of which the remnants were obtained. (*Brig Triumph*, MSS. July 27, 1841.)

It is held in the English Courts, that a mortgagee of a ship cannot maintain an action in Admiralty to enforce the encumbrance, the hypothecation not being considered one of a maritime character; (*The Elmouthe*, 2 Hagg. 882; *The Neptune*, 3 Hagg. 132;) and probably the same doctrine will be upheld in the federal Courts; but in both tribunals he is allowed to have satisfaction of the mortgage debt out of the proceeds of the ship in Court.

The distinction between the right of a mortgagee to attach the ship or impound her proceeds in Admiralty, for the satisfaction of a mortgage debt, would appear more a matter of words than of substance. It no doubt takes its origin in the apprehensiveness of the English Court, that it may encounter a writ of prohibition in touching a subject of a somewhat dubious nomenclature, the contract of security being a common law obligation and the subject pledged, and probably the consideration of the contract being maritime in its character. Still, without the exercise of such control over the proceeds to be disbursed by the Court, so palpable it was that great wrong must otherwise be sustained by the mortgagee, that the Court has yielded in part its scruple, and admitted him to recover his money out of the avails of the pledge he held for its security.

The Court, by force of its jurisdiction over a maritime lien, very probably posterior in point of time to the mortgage, will have taken away the mortgage pledge, and converted it into money; and if the Court, after satisfying the decree, cannot retain the balance of

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proceeds for the benefit of the mortgage charge, they must be transferred to the mortgagor as legal owner, and thus the mortgage creditor be deprived of all remedy upon his encumbrance.

I think this Court may take cognizance of, and adjudicate upon claims preferred against a fund in Court, and distribute that fund conformably to the legal and equitable rights of the respective claimants, without being restrained in the administration of this equity to cases of maritime jurisdiction. (*Andrews v. Hall*, 3 *How.* 568.)

Whether such jurisdiction will be exercised, must rest in the sound discretion of the Court, in view of the complexity or nature of conflicting interests.

This case depends upon documentary evidence, presenting but a single question, essentially one of fact, and I see no reason why the Court should decline considering the point, and determining whether the fund shall pass to the mortgagor or mortgagee, without regard to its competency to act upon a mortgage conveyance as a cause of action in Admiralty.

The other items of demand brought forward by Quincy, set forth in his answer and claim, and also made the foundation of a special petition, are most of them advances for the benefit of the ship, and would compose maritime liens, and be entitled, *per se*, to the privilege of payment out of her proceeds.

The particulars in controversy between these claimants are, first, the validity of the mortgage debt of \$5,175, claimed by Quincy; and secondly, the claim of \$1,050 paid by Quincy to Schmidt & Balshe in favor of Cameron in relation to a charter-party upon the ship.

It is charged on the part of Cameron, that the mort-

gage security is void, being founded on an usurious consideration.

The usury is alleged to consist in a charge by Quincy of a commission of $2\frac{1}{2}$ per cent. on \$12,000, the consideration paid on the purchase of the ship for Cameron, but the title to which was conveyed to him to secure his various advances, amounting to \$5,175.

The letter of Cameron to Quincy, of Dec. 19, 1844, on the subject of the purchase and conveyance of the ship, concludes him in my opinion, on the fact as to the real ownership, and his liability under the transaction.

In that letter he declared the purchase to have been made on his account, and the bill of sale to have been taken in Quincy's name, as security for the acceptance of a draft of \$5,175, in part for purchase money of the ship, and commission thereon, and in part for other advances Quincy might make on account of the ship.

The inquiry then is, were the commissions received for services in the purchase of the ship, or were they intended between the parties as a compensation for a loan, beyond the interest reserved and received thereon?

The proofs leave no ground to doubt that the commission claimed is the ordinary compensation allowed for similar services, by the long-established mercantile usages of the city. The Board of Commerce recognise and approve it as a proper and customary compensation in like agencies and negotiations; and it is furthermore in direct proof that $2\frac{1}{2}$ per cent. commission on the purchase price is the customary and well-known allowance to merchants and brokers for buying vessels. This is earned and paid when neither the personal credit or funds of the agent are employed; and the commission is not regarded as having any relation to

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advances made or responsibilities assumed by the agent in the negotiation.

There is nothing in the evidence inducing a suspicion that this transaction was other than is usual in that description of business.

The purchase was *bona fide*, at the instance and for the benefit of Cameron, and would seem to have been regarded as advantageous to him in its terms, for the ship was immediately insured for his benefit at \$14,750, \$2,750 above the consideration paid.

The point, whether charging a commission or compensation for services in connection with the loan of money, and also legal interest upon the loan, amounts to usury, has been largely discussed in the books, and with great diversity of opinions.

In the decisions in the Courts of this State the subject has been thoroughly examined, and it may now be considered settled by the judgment of those tribunals, that taking, in the usual course of business, the customary and appropriate commission for services actually performed, although accompanied also with the advance of money upon which interest is reserved, does not constitute a violation of the laws against usury, unless an usurious purpose and intention in the proceeding is proved, and will not vitiate a credit or loan, on interest, concomitant upon such service. (*Notten v. Curtis*, 19 *Johns*, 160; *Suydam v. Westfall*, 4 *Hill*, 218; *Ketcham v. Barber*, 4 *Hill*, 224.) The like principle is declared in Connecticut. (*De Forest v. Strong*, 8 *Conn. R.* 222.)

The evidence in this case shows that the intervention of Quincy in the purchase of the ship was according to ordinary mercantile transactions of the kind, and the

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interest he stipulated to have in the after business of the ship, in procuring freight, receiving her consignments and making the necessary insurances and advances in her employment upon accustomed allowance, strongly indicate that the arrangement was legal and fair, and not for the purpose of securing and covering an illegal interest on the loan.

I shall accordingly pronounce for the mortgage debt, with interest, as not affected by the allegation of usury.

The stipulation between the parties of the 19th of December, 1844, also binds the ship as collateral security to Quincy, for any other advances he might make to Cameron on her account, with the regular charges thereon.

This clearly embraces the disbursements for insurance and commissions therefor, towing or pilotage to sea, filling water casks on board, and \$500 cash advanced to Cameron, to provide for disbursements in behalf of the ship on her homeward voyage. Those particulars compose the items of Quincy's account, amounting to \$8,569 49, except \$1,050 alleged to have been paid Schmidt & Balshe, for advances made by them on account of a charter-party for a voyage to Stettin, with commissions, &c., and \$200 paid George Marshal for loading her. The last item was a stevedore's bill for stowing the cargo taken on board under the charter-party to Stettin.

On the 14th of July, 1845, Cameron executed a charter-party on the ship for a voyage to Stettin, in favor of Schmidt & Balshe of this city. It is unnecessary to rehearse the circumstances leading to the engagement of the ship, or the considerations expected to be realized. When the charter-party was executed,

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the existence of the bottomry bond to the libellant was known to all parties, and that it was in the hands of the agents of the libellant, in this city, ready to be enforced against the ship. A verbal arrangement or understanding was had with the agents, that on the payment to them of \$3,500 when the ship became ready for sea, she might make the voyage without molestation on account of the balance due upon the bottomry loan. The charterers loaded the ship under the charter-party, and advanced to the master and for the ship, \$1,114 41, but the \$3,500 not being paid to the agents of the bondholder, they caused her to be arrested when hauled out and ready for sea. Schmidt & Balshé, the charterers, thereupon demanded the repayment of their advances, and satisfaction for the breach of contract, and an arrangement was made, under which Quincy paid them \$1,050 in full satisfaction of their advances, and took their assignment to himself of that demand, and the purchaser of the ship under the bottomry sale then permitted her to perform the voyage under the charter-party.

Quincy claims he is entitled to receive that \$1,050 out of the proceeds, as a demand chargeable upon the ship, or as comprehended within the stipulation of December 19, 1844.

If this sum of \$3,500 was to be paid absolutely in advance as the price of hiring the ship or the liquidated compensation for transporting the cargo, there might, perhaps, be grounds for concluding that the charterers took upon themselves the risk of the voyage being performed, and could not, in case of its failure, compel the repayment of the money. (4 *M. & S.* 37; *Watson v. Duykinck*, 3 *Johns. R.* 335.)

The rule generally applicable to advances of freight is, undoubtedly, that the shippers can recover it back if the cargo is not transported and delivered conformably to the contract. (*Detorche v. Peck*, 9 Johns. R. 210; *Ib.* 212, *note*.) This charter-party does not stipulate a gross sum for the hire of the ship. The engagement of the charterers is to pay certain specified rates of freight, "for the charter or freight of the vessel during the voyage," with five per cent. primage. Another memorandum in writing is, "At Stettin, &c., consign to friends of charterers, subject to 2½ commns., on amount of freight in one place only." "\$3,500 to be advanced in N. Y., on the freight, when the vessel is loaded, for which a draft is to be given on Stettin at the rate of 67c. per Prussian rix dollar, and policy of insurance for same, to be handed over as security. Five per cent. comm. on freight to be paid here."

It is manifest, upon these stipulations, that this was an ordinary case of affreightment, leaving the respective parties under the obligations usually attaching to that contract, and that the reserve of part of the freight here did not vary the liability of either party towards the other in respect to the performance of the contract.

If upon the principles of the maritime law, the charterer has a right to hold a vessel liable for the repayment of freight advanced when the voyage has not been performed, or goods delivered, Schmidt & Balshe, in this case, would have possessed such lien, because, as between them and Cameron, the charter-party had been annulled by his failure to discharge the bottomry lien, and Quincy, by their assignment of that demand, would

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have become entitled to their privileges and remedies thereon. This point is not free from difficulties.

To a certain extent the engagements in charter-parties are undoubtedly to be regarded as personal only, and not *real*, or affecting the vessel. Such would be stipulations to take cargo on board, to surrender up designated portions of the ship, to have her at particular places at particular times to receive her lading, &c., &c. There can be no better reason for enforcing *in rem* such contracts than those for buying a ship for a given service, or having her equipped for it at a time fixed; or that she shall be provided with certain documents in order to be freighted, such as a warranty of national character, a clean bill of health, free of contraband of war, &c. Agreements of that character would acquire no higher effect by being inserted in a charter-party than if contained in a bill of sale or other contract; and I am aware of no authority upon which claims of that description could be prosecuted in Admiralty Courts against the ship, nor do I regard those engagements coming within the jurisdiction of the Court in suits *in personam*.

In the present case, the owner would have had a lien on the goods on board for the freight, and the reciprocal lien of the shippers on the ship for the delivery of the cargo would attach in their favor. (8 *Wheat.* 605; *Ware*, 149; 2 *Sumn.* 509; 8 *Cranch*, 49; 2 *Sumn.* 589; 1 *Sumn.* 551; *Ware*, 263; *Ibid.* 322.)

Had the cargo not been delivered according to the terms of the charter-party, the shippers would clearly then have a right upon their bills of lading, and also upon the charter-party, (2 *Sumn.* 589; 1 *Sumn.*

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551,) to proceed *in rem* against the vessel for the amount of their interest and the losses thereon. (*Andrews v. Wall*, 3 *How. R.* 568.)

In such case the loss would not only be the value of the goods, but also the freight paid for their transportation, and both items would be recoverable.

The ship becomes answerable for the safe keeping and safe delivery of the cargo from the time it is placed on board. (*Abbott*, 222.) The freight, when advanced, may reasonably be regarded as constituting part of the value of the cargo, which the ship is thus bound to deliver to the freighter; and the two united would compose the encumbrance or lien for which a freighted vessel stands responsible.

On the sale of the ship and breaking up of the voyage, by fault of the owner, the shipper of the cargo could have attached her in the hands of the purchaser as subject to that double lien. 1. For the return of the cargo or its value; 2. The repayment of the freight advanced; and the purchaser would clearly have been allowed the amount of such liens, to be deducted from the sum of the purchase-money.

The whole purchase-money being paid into Court, the adjustment of the rights of the parties in respect to it will now be the same as if it had been retained by the purchaser to await the judgment of the Court, and be paid pursuant to judicial directions.

Accordingly, I am of opinion that *Schmidt & Balch* acquired a lien upon the vessel to the amount of the freight advanced by them under the charter-party. That privilege passed to Quincy under their assignment, and he can, since the sale of the vessel, enforce the right against her proceeds in Court, to the amount of

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his loss, which, in this case, is to be measured by the amount of his actual payment on the assignment, \$1,050, that being the liquidation of the damage by the parties.

The sum of \$200, paid by Quincy to Marshall, the stevedore, is disallowed.

This Court has repeatedly held that stevedores do not rank above shore laborers, and have no more lien on the vessel for stowing cargo than carmen have for bringing it to the ship, or the wharfinger for hoisting it on board. Their contracts are personal with the master or owner, and their remedy must be against their employers.

This claim cannot be admitted under the authority of the stipulation of December 19, 1844, because the payment was not made to Cameron or by his request, nor was it on account of the ship, she not being responsible for it.

The decree will be that Quincy be allowed and paid, out of the proceeds in Court, his account, to the amount of \$8,369 49, (including the mortgage loan,) with interest from the time of payment or advance of the respective items by him.

There yet remaining various petitions against the fund in Court, the residue of it, after satisfying this order or decree in favor of Quincy, will be retained in Court until it be determined whether the sums claimed by the petitioners are chargeable solely against Cameron personally, or they attach to the whole balance undisposed of, as proceeds representing the vessel.

Reference was made on the argument to policies of insurance held by Quincy, and a deduction or allowance was claimed to be due Cameron on that account. The facts have not been brought out on that point so

as to enable the Court to dispose of it, and this decree is to be considered as leaving the rights of the parties in this behalf unaffected.

A decree was entered in the cause in accordance with the principles laid down in the foregoing decision.

CHARLES THATCHER v. JAMES McCULLOH.

An action for the recovery of freight lies in Admiralty in favor of the master of a ship against the consignee of cargo, equally *in personam* and *in rem*.

An intention of the master of a ship to depart from her direct voyage and stop at an intermediate port for the purpose of taking in additional cargo, if assented to or made known to a shipper when bills of lading are executed to him, is not a deviation which annuls the contract of affreightment on his part.

If it might amount to a violation of the contract *per se*, the acceptance of the cargo by the shipper, with knowledge of the fact of deviation, restores to the ship-owner his right to freight.

The known usage of trade and navigation from New-Orleans to northern ports, in the summer season, to touch at Havana for further cargo, prevents such act being a deviation, although the freighter had no notice of the intention of the master to make that port on the particular voyage.

Although the further stopping at Key West on the voyage, without the assent or knowledge of the freighter, is an unwarranted deviation which may avoid the contract of affreightment at the option of the freighter, his acceptance of the cargo, with full knowledge of the deviation, reinstates in the master the right to recover the freight; but receiving the cargo in that manner does not deprive the consignee of a right of action for any special damages he may have sustained because of the deviation.

The Court is not under the necessity of driving the consignee to a cross-action in such case, nor for recovery of other damages or claims arising out of the contract, but may adjust and recompense his damages by way of recoupment in the action prosecuted for freight.

Those damages may embrace whatever could be demanded by a cross-action for the non-fulfilment of the contract of affreightment, including extra premiums of insurance paid because of the deviations on the voyage.

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A. W. Bradford, for the libellant.

Jesse C. Smith, for the respondent.

THIS was an action by the master of the ship *Celia* against the consignee of part of her cargo, to recover freight on a shipment of lead from New-Orleans to New-York.

The bills of lading were dated at New-Orleans the 27th and 29th of August, 1844. The ship sailed about the time of their date, partly laden, and ran to Havana, to take in the complement of her cargo. She arrived there the first of October, just previous to a hurricane, which set in at that period in that latitude.

The *Celia* was a general ship; her main loading was cotton; the lead on board composed her ballast.

Not succeeding in filling up her cargo readily at Havana, she went over to Key West, and took in her lading of cotton from a French vessel, wrecked in that vicinity.

Key West lies 60 to 70 miles north of Havana, and 30 to 40 off the usual track or route of vessels from Havana to New-York. The ship was detained about two days at Key West, in taking in her cargo. She arrived in New-York in November. The consignee was advised, before the arrival of the ship, of the deviation to Havana and to Key West, and effected extra insurances for those runs on account of the deviations.

It is the notorious usage at New-Orleans for general ships bound to northern ports in the summer season, because of the difficulty of obtaining full cargoes at that period in New-Orleans, to touch at Havana on their home voyage to make up their lading. There

was evidence, also, in the case, that it was understood between the agent of the consignee and the agent of the ship when the affreightment of the lead was made, that the ship would probably follow that custom; and that in case she touched at Havana, the extra insurance therefor was to be at the charge of the ship.

The shipment of lead was accepted by the consignee at New-York, less fifty pigs short of the amount stated in the bills of lading.

Testimony was taken on the trial, to a great extent, in relation to the state of the lead market in this port when the ship would be properly due here, according to usual voyages at that season direct from Havana, and at the time of her actual arrival.

The main bearing of it showed a declining market, as is usual through the fall months and December; but the rate of depreciation appeared very unsettled, and no precise certainty of the value of lead at the two points indicated was established, and the evidence failed to show there was any appreciable change of prices for ten or twenty days directly preceding the arrival of the ship here.

Demurrage was claimed for the delay of the voyage by taking the circuitous route and stopping at Havana and Key West. But the evidence did not go beyond loose conjectures and estimates as to the loss of time, and was not in harmony as to any loss at all having been so occasioned.

Objections were taken to the competency of a Court of Admiralty to entertain an action by the master of the ship against the consignee *in personam* for freight; and the defence further insisted that the deviations on the voyage annulled the contract of affreightment in

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favor of the ship, and that no action was maintainable thereon by master or owner.

BETTS, J.—A leading point made by the respondents is, that the Court cannot take jurisdiction of an action *in personam*, for freight brought by a master of a vessel against a consignee of her cargo.

It is not controverted that the vessel is bound to the shipper for the delivery of the cargo, nor but that the cargo is bound *in rem* for the payment of freight; but it is urged upon the notion of the English common law Courts, that the action against the consignee upon the implied contract to pay freight, must be sued in a Court of law in the name of the ship-owner.

No additional light can be thrown upon the question of the jurisdiction over the subject in this Court by restating the decisions already before the public, or the principles upon which they rest. I consider the rightful jurisdiction of the Admiralty in such cases fully sustained by the authority of the eminent jurists who have discussed and sanctioned it. (1 *Sumner*, 551; 2 *Sumner*, 589; 1 *Ware*, 149; 3 *Kent*, 3d ed. 218, 223; *Oleirac*, 722; *Boulay Paty*, 297.) I hold, in concurrence with the doctrines of those authorities, that this Court has jurisdiction over the subject matter.

The method of exercising the jurisdiction is merely matter of practice; and the remedy is no more restricted in principle to actions *in rem* than *in personam*. Indeed, in the original constitution of the Court, suits in their personal form were those in which the jurisdiction was most distinctly exercised, (2 *Browne's Civ. & Adm. Pr.* 432; *Clarke's Praxis*, tit. 1, *Marriott form*, 30,) and there is no principle involved in the

functions of the Court which imparts to it cognizance *in rem* over a broader field of cases than falls within its powers in actions *in personam*. (4 *Wheat.* 479.) Its special and vital properties are the brevity, simplicity and celerity of its proceedings, adapting it to the emergencies of commerce and navigation. (1 *Kent*, 380.)

If the respondent intended to set up the alleged deviation of the ship on her voyage as a rescission of his liability for freight, he should have refused to receive the cargo. By accepting that, he waived the right to annul the whole contract, and must rely upon his right to indemnification under it because of its imperfect fulfilment. (*Abbott*, 192; 3 *Kent*, 221.)

Although the evidence falls short of proving a direct consent on the part of the respondent to the libellant, in respect to this particular shipment, that the voyage might be made by way of Havana, yet the assent of his agent to the agent of the ship in regard to other shipments on board her at the same time, of like goods, to the same destination, that the circuitous route might be run, affords a reasonable implication that the arrangement with all the freighters was substantially of a common import, and with the understanding that the ship was to touch at Havana for the purpose of making up a full cargo.

I think, independently of any binding assent to the circuitous voyage, that the evidence establishes sufficiently the usage of the trade in respect to voyages from New-Orleans to New-York in general ships, at that season when freights are short, to have been to touch at Havana to complete their cargoes. The evidence satisfactorily shows that the entire voyage in that way is usually essentially expedited. The shipper must be supposed

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cognizant of this course of trade, and to have had it in view when the contract was entered into, and cannot, therefore, take exception to it because the deviation may affect his insurance. (*Abbott*, 192; 1 *Phillips' Ins.* 182-184; 1 *Condy's Marshall*, B. 1, ch. 6, § 2, pp. 185, 186.) Nor probably would such departure from a direct voyage be a deviation which would affect the policy. . (2 *Phillips' Ins.* ch. 12, § 1.)

In a case before Lord Eldon, on a vessel bound from Newfoundland to Portugal, where the vessel went to Sidney, in Nova Scotia, for a cargo of coals, he rules that such subordinate voyage, *being in conformity to usage*, was not a deviation. (*Origin v. Jennings*, 1 *Camp.* 505; *Lockett v. Merchants' Ins. Co.*, 10 *Rob. R. Lou.* 339.)

By a bill of lading, expressing that goods are to be carried from one port to another, a direct voyage is *prima facie* intended; but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge on the part of the shipper that such a course is to be pursued. (*Lowry v. Russell*, 8 *Pick. R.* 360.)

A ship, under these circumstances, would ordinarily be detained at New-Orleans a period greatly longer to fill up her freight than is required to run the additional distance by way of Havana.

Under the proofs, the voyage in question, by way of Havana, did not amount to a deviation which affected the rights of the ship-owner, as against the shippers, (7 *Cranch*, 487,) and but from her afterwards putting into Key West, without necessity, there would be nothing in this branch of the case demanding special consideration. After stopping at Havana and finding her cargo

could at once be made up at Key West, she run over and filled up at that port. There is no evidence that it was a customary course for vessels from New-Orleans, or even from Havana, to touch at Key West. (1 *Philips' Ins.* 154.)

This was accordingly a deviation which impaired the policies of the respondent, though it might conduce to expedite the voyage. (13 *Mass. R.* 68; *Roccus on Ins. note*, 52; 3 *Johns. Cases*, 10; 2 *Johns. R.* 138; 3 *Wash. C. C. R.* 150; 2 *Cranch*, 257, *note*.)

In a special action for the loss sustained because of the circuitry and delay of the voyage, the freighter might undoubtedly recover damages commensurate to any injury he could prove accrued from that cause; such cross-action might probably be sustained by the merchant, notwithstanding his acceptance of the cargo. (*Bowman v. Tooke*, 1 *Campb. R.* 377.) I perceive no objection to adjusting the equitable rights of the parties, without double action, by allowing, by way of recoupment of freight, the amount of damages sustained by the respondent by means of the breach of contract of affreightment in the deviation to Key West.

No specific objection has been raised by the libellant to that course, and it may avoid a cross-action, with accumulated expenses.

I think it is clear the libellant is entitled to his full freight according to the bills of lading.

On the other hand, he should be charged with the invoice value of forty pigs of lead lost on the voyage, with ten per cent. added thereto, and he should also repay the extra insurance because of the circuitous voyage, with interest thereon from the time of its payment to the arrival of the vessel at this port.

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The consent to vary the route was upon condition that her owner should pay the extra premiums of insurance disbursed by the consignees, to whom the assent was given.

The testimony is not very explicit as to the time of such payments, nor indeed to the amount; and the subject must go before a commissioner for adjustment, unless the parties, by stipulation, settle the facts between themselves.

There is no reliable evidence how much, if any, the voyage was prolonged by the ship's touching at Key West. It is reasonably to be inferred that she was delayed all the time of her detention at that port. Still that fact would not afford a satisfactory measure of the time she should have arrived in this port, so as to afford a basis for allowing a *quasi* demurrage for such period.

There is testimony tending to show that entering that port withdrew her from the range of hurricanes prevailing at that season in that region, which might have occasioned a much more serious delay.

These contingencies of navigation are not of that definiteness to afford a guide for the computation of detentions and damages therefor. The Court cannot speculate upon that point now. The proper time for the respondent to have availed himself of the deviation, it being known to him, was on the arrival of the vessel; and on the circumstances of this case, he should be deemed, by accepting the cargo without objection then, to have waived alike all damages for delays and deviations on the voyage. These particulars will, therefore, be disallowed in the present case, although under a different state of facts they might properly go before a

commissioner for investigation and allowance, with other claims for losses or prejudices sustained by the freighter on the voyage.

Nor is the proof on his part satisfactory to show any deterioration in the price of lead within ten or fifteen days antecedent to the arrival of the *Celia*. The evidence to that point was exceedingly indefinite and discordant, and, I think, in its general result, conduces to establish the contrary.

I accordingly decree for freight according to the terms of the bills of lading, deducting from it the forty pigs of lead not delivered, and allowing the respondent the value of that lead at New-Orleans, with ten per cent. added thereto, and also allowing the respondent extra premiums of insurance actually paid by him on account of the change of route, and interest on such extra insurance from the the time of payment to the time of the arrival of the ship in this port.

If the parties do not, by mutual arrangement, fix the time of the arrival of the *Celia* in this port, and the time and amount of extra insurance, and the value of the forty pigs of lead in New-Orleans, let the case be referred to a commissioner to ascertain and report those particulars.

The question of costs will be reserved until it is ascertained whether a balance be due the libellants.

THE SHIP MOSLEM.

The prevailing party in Admiralty suits is *prima facie* entitled to recover costs. The decree in his favor implies that he has been wrongfully delayed or prosecuted.

Still the common law rule to give costs in all cases to the successful suitor is not recognised in Admiralty as the law of costs, and they are awarded at the sound discretion of the Court, without regard to the ultimate termination of the action.

A seaman will be denied costs in a suit for a small balance of wages due him, when payment of the balance has not been demanded of the master or owner of the ship, and no refusal to pay them has been made by either, and particularly if the seaman tacks to the debt other distinct and unsupported claims, and sues for the whole conjointly.

Upon the hearing and decision of this cause in March term last, the Court ordered a reference to a commissioner to ascertain and report the precise date the libellant was imprisoned at Pernambuco the last time, in order to determine whether he rendered any services to the ship after that period.

The commissioner made his report pursuant to the order, and when filed, the claimants interposed exceptions to it.

The exceptions were argued by

H. Burr, for the claimants.

A. Nash, for the libellant.

The facts brought out by the exceptions and made the basis of the decision, will sufficiently appear in the opinion of the Court.

PER CURIAM.—The commissioner, pursuant to the order made in March upon the decision on the merits of this case, reported that the libellant was last *imprisoned* at Pernambuco, previous to the sailing of the ship for New-York, on the 2d day of April, 1845, and, computing his wages to that day, found the amount earned to be \$33 44, and the balance due him \$15 42, after all just deductions allowed against him.

The claimants except to the report, and the point raised by the exception relates to the time to which the commissioner carried forward and credited wages to the libellant.

The Court, on the final decree, regarded the libellant entitled to wages to a certain period of the voyage, and that he had disabled himself claiming wages subsequent to that; but, upon the answer of the master and the proofs before the Court, it was equivocal whether the libellant, after one imprisonment in Pernambuco by the local authorities at the instance of the master, and his subsequent return to duty with a virtual condonation of the offence, and substantially under a new engagement, had been again put in confinement by order of the master; and if so, when such imprisonment took place.

It not having been a prominent consideration in the contestation of the cause, to determine precisely the termination of the libellant's imprisonment at Pernambuco, the Court decreed it proper, with a view to the final disposal of the case, to refer the subject to a commissioner to report what was "the time the libellant was last imprisoned and confined at Pernambuco previous to the sailing of the ship for New-York." In this way the Court hoped to ascertain, satisfactorily, whether

The Ship Moslem.

the libellant was all the time subject to his original shipping contract, or was to be regarded connected with the ship by a new engagement at Pernambuco.

The commissioner reported that time to have been the 2d of April, 1845, and returned the evidence upon which the report was founded.

It appears that the ship arrived at Pernambuco about the 24th of February, 1845, and that on the 27th, Scott and his co-libellants were imprisoned on shore, because of their refusal to assist in unloading and repairing the vessel. They remained in prison until the 11th of March, when they were taken out and returned to duty on board, agreeing to continue with the ship to the termination of the voyage.

The libellant, when intoxicated, proved insubordinate and disorderly, yet in the main conducted so far satisfactorily to the officers of the ship that he was retained at his work until about the 20th of April. Having that day been guilty of gross acts of violence towards the master, he jumped overboard and swam ashore to escape arrest by the officers, and the master states, in his answer, was confined on shore by the local authorities, and was the next day brought back to the ship by his orders.

Rooney, a witness for the libellant, testified that Scott was put in prison a second time, three days after that release, and was confined six days, and that he was out of prison twelve or fourteen days on duty, when he was again put in irons. There is a good deal of obscurity in the testimony respecting the order of the transactions with Scott on shore and in the ship, but I think the more credible explanation of the circumstances is, that the day after the affray, on the 2d

of April, Scott was brought back to the ship and flogged, but refusing to return to duty, he was put in irons on board, where the master and under officers endeavored to bring him to submit to their authority. The ship sailed the 6th of May, and Scott, persisting in refusing to obey orders on board, was continued in irons until his arrival in New-York.

Neither the captain, in his answer, nor the second mate or steward, in their testimony, speak of the second imprisonment testified to by Rooney, nor does Rooney, the mate or steward give evidence of Scott's confinement on shore the first of April; but it is manifest, by comparing all the proofs, that the libellant was in prison ashore after his release on the 11th of March; and as it belonged to the claimants to prove that this was anterior to his being put in irons in the ship, and as this was a specific point of reference to the commissioner, I shall concur in the conclusion of the commissioner who examined this point carefully, that Scott was imprisoned in Pernambuco the day before he was put in irons on board the ship, and overrule the exception to the report on that point, and adopt the report that there is payable to the libellant the sum of \$15 42 out of the wages due him on the voyage to Pernambuco.

The question of chief interest to the parties in this cause is that of costs, as they have accumulated to considerable magnitude from the course the litigation has taken.

The Court has already decreed costs in full to the claimants as against the co-libellants of Scott, and it remains to consider what are the equities in respect to this particular suit.

The claims of costs between litigant parties, where

The Ship Mosaic.

there is usually much wrong, mingled with strong color of right on each side, more especially in actions for seamen's wages, present a class of questions of the most perplexing character, not readily settled upon any fixed principles.

The common law rule of awarding costs invariably to the successful party is often marked with such manifest impropriety, not to say injustice, that Courts of equitable authority reject it as a principle of decision, and assume to regard costs as one of the subjects of litigation, and dispose of them with a view to all the sound equities of the case. (3 *Peters' R.* 319; 3 *Hagg.* 76; 1 *Hagg.* 83; 1 *Wm. Robinson*, 21; *Ibid.* 124; *Ibid.* 131; *Ibid.* 215; *Ibid.* 334; *Ibid.* 447.)

In most of the cases cited, costs were decreed to the party prevailing in the action, and yet numerous decisions are found in the English and American Admiralty reports where costs are awarded and withheld, irrespective of the result of the suit on the merits. (2 *Hagg.* 90; 1 *Notes of Cases*, 305; 1 *Hagg. (Eccl. R.)* 210; *Ware*, 395; 3 *Dall.* 34.)

The Court is accordingly bound, in determining the matter of costs, to weigh the relative rights and equities of the parties disclosed in the case, without being governed by the ultimate conclusion for or against either in the decision of the subject in controversy.

The prevailing party is *prima facie* entitled to the costs of his suit or defence, the decree in his favor importing that he has been wrongfully delayed or prosecuted. This inference is, however, open in Admiralty suits to be met and displaced by the general equities of the case.

The Ship Moalem.

This action was instituted to recover, and the libel demands wages for the entire voyage from Cape Town to New-York, and also extra wages of one dollar per day, apparently for the entire voyage, but with certainty from Cape Town to Pernambuco.

The answer and claim of the master contests and denies the whole demand. It claims a forfeiture of the contract wages, because of the mutinous misconduct of the libellant, and denies the obligation of the special agreement at sea to pay wages, set up in the libel, and both parties take proofs at great length in support of their respective allegations.

The Court made a decree for a small part of the libellant's demand, and sustained the answer as to most of the particulars contested, and which embodied those branches of the case most strenuously litigated.

The award of wages for part of the voyage was not upon the ground of the general meritorious conduct of the libellant; on the contrary, the Court was constrained to declare his conduct on board during that period to have been often disorderly and mutinous, and his claim to wages was supported only because the Court regarded the discipline inflicted by the master, the submission of the libellant and his after restoration to duty, as an equitable remission of the forfeiture which might otherwise have been enforced against him. Had the case accordingly presented no other question than the libellant's right to wages to Pernambuco, I am not prepared to say that the defence would not have been regarded *bona fide* as to that demand, and the authorities cited show that the Court will not then necessarily give costs against the ship or owner, although the defence is unsuccessful.

The Ship Moslem.

The other features of the case, the demand of extra wages, and of contract wages for the entire voyage, compelled the owners to contest the suit, and they have clearly shown that it was unfounded and inequitable in relation to any claim beyond that of simple wages to Pernambuco, and these were saved only through an implied condonation of the offences which would have forfeited them.

I think, then, it would be contrary to the usage of Admiralty Courts, and against the principle regulating their proceedings, to regard the small recovery of \$15 42, as entitling the libellant to costs against the owners, when they have defeated claims of his mingled with it to several times that amount, and have proved his conduct in all respects from the time he undertook the voyage from Pernambuco to New-York mutinous and most injurious to their interests.

Although I cannot, for these considerations, award the libellant costs, and although the proofs show his conduct to have been often turbulent and highly insubordinate, yet there are some particulars in the case evincing great hardship upon the libellant, and I am not disposed to subject him to any decree in favor of the master or owners for costs.

As to the voyage to Pernambuco, there was strong color for his belief that he had been shipped on board a vessel no way seaworthy. And his disorderly and refractory conduct in that state of mind justly claims a lenient and forbearing consideration. And in the mixed and confused events connected with his conduct, and the dealings of the master with him at Pernambuco, I am inclined to think it must be understood that the old contract between them ended with that part of the

voyage, and that his return to the ship at that port was upon a new engagement for the home voyage. From that time he plainly forfeited all wages for services he might have rendered on board before the ship sailed from Pernambuco, but the severity of treatment he underwent at the time and during the voyage ought to be regarded a sufficient punishment, without having added to it a decree for costs of suit. He was kept in irons on board of the ship more than a month at Pernambuco, and from that port to New-York, without evidence to show that this was necessary for the safety of the officers, the crew or the vessel. He also proves his repeated demand of the master to be discharged at Pernambuco, and having been shipped abroad and being a foreigner, the master was under no obligation to bring him to the United States.

Upon these considerations, I decree that the owners pay the libellant, or his proctors, \$15 42, the wages due on the arrival of the ship at Pernambuco, and that each party pay his own costs in this action. Costs are withheld from the libellant on the recovery of the small balance of \$15 42 found to be due him, because he had never demanded payment of that sum before suit, brought, nor had it been refused him by the master or owner, but more especially because he made that balance the occasion of tacking to it in this suit unwarrantable claims, and driving the parties into an expensive and protracted litigation.

Remnants in Court.

REMNANTS IN COURT.

The surpluses or remnants of proceeds on the sale of a ship under the process of the Court, are a representative of the ship, and subject to claims which might be enforced against her *in rem*.

Services or supplies furnished a domestic vessel in her home port, at the request of the master and owner, to fit her out for a foreign voyage, and to be paid for on her return to her home port, acquire no lien or privilege upon the ship under the act of this State. (2 R. S. 405, § 2.) They are personal credits to the parties. Such debts, accordingly, have no privilege of payment as against remnants in Court.

A mortgage debt against a ship will, in marshalling her proceeds for distribution, be entitled, after satisfaction of privileged and lien debts, to payment as against the owner.

Quere. Whether the Court can take cognizance of debts of the ship-owner which do not possess maritime privileges, and apply a distributive part of remnants in the registry to them?

Tyson & Judah filed their libel and petition, seeking to have the proceeds or remnants of the ship Panama paid to them in satisfaction of their debts, and to prohibit the payment of the moneys to Cameron or Quincy, the claimants in the action which produced the remnants.

The ship was condemned in April last (*ante*, p. 343) to be sold in satisfaction of a bottomry loan, and after fulfilling that decree, there are remnants of her proceeds in Court undisposed of. These applicants claim that balance, alleging they have a prior equity to it over Cameron and Quincy, who also claimed it against each other.

The petitioners allege there is due them a large sum for services and supplies furnished by them to the ship in this port, where she is owned, to fit her out for a voyage to Stettin; and that the day she was ready to sail and about to get under way, she was arrested in

the action on the bottomry hypothecation, and that thus the voyage was broken up. They also allege that Quincy was the real owner of the ship, and that they are entitled to her proceeds in preference to him.

Quincy opposed the application, insisting that the petitioners' debts never possessed any lien or privilege upon the ship or her proceeds.

The debts of the petitioners arose from services, supplies, materials, &c., furnished by them to the master and owner of the ship whilst she was preparing for the voyage above mentioned, on an agreement that payment therefor should be made on the return of the ship to this port.

It was also urged, in opposition to the petitioners, that the mortgage debt had a privilege of payment against the remnants of the ship in Court, and that the claims of the applicants were no lien on the ship or the remnants, and not within the jurisdiction of this Court. The essential facts of the case are sufficiently stated in the opinion of the Court.

S. Judah, for the petitioners.

F. B. Cutting, for Quincy.

BERRS, J.—The supplies, satisfaction for which is claimed in this proceeding, were purchased by the master and owner of the ship, on an agreement that payment should be made after her return from the voyage then expected to be made to Stettin. (*Ante*, p. 343.)

She was fitting out for a voyage to that port, and after getting ready for sea and about to sail, she was arrested by a bottomry creditor, and was condemned to

be sold, and the voyage was thus broken up. Cameron, her master and owner, resided in this port, and the mortgage upon her to Quincy was executed and duly registered here. It is contended by the petitioners that they are, by means of the judicial sale, released from the terms of credit, and remitted to their original privilege or right of lien upon the vessel for the outfit supplied her.

I think it plain that the debt due the petitioners had no privilege or lien upon the ship when she was arrested and sold in the bottomry action. The law of this State authorizing a lien upon domestic vessels, declares it shall cease immediately after the vessel shall have left the State. (2 R. S. 405, § 2.)

The Supreme Court, in examining the effect of such lien, decided that it is to be regarded as waived, when the contract contains stipulations inconsistent with the lien, or from which it may be fairly inferred that a waiver was intended, and the personal responsibility of the party only relied on. (*Peyroux and others v. Howard & Varion*, 7 Peters' R. 344.) And the Court held the lien waived in that case under circumstances connected with the terms of the law of Louisiana, far less forcible and direct to raise the presumption of waiver than in this case. When the credit is expressly given to the master or owner, the claims of material men never become a lien on the vessel. (*The General Smith*, 4 Wheat, 438.)

It is manifest here that the goods were furnished with the intent and for the purpose of having the ship leave the State before payment could be required by the furnishers; and although the after abandonment of the voyage may rescind the credit so as to leave an immediate right of action against the owner and master for the price of the goods furnished, it does not

affect the character of the bargain of purchase and sale, which was without regard to the statutory liability of the ship, but rested wholly upon the personal credit given the master and owner by the contract. The purpose of the statute is to protect mechanics, material men and furnishers, who contribute their services or property to the wants of a domestic vessel in her employment from losses they would be exposed to by leaving her the ability to depart from the place of credit without satisfying her debts. It is a power to restrain her departure which the act bestows, thus placing the vessel in legal pledge to the creditor when the credit has been given to her whilst she remains in port, but to cease entirely on her leaving it for a foreign port. The act imports that the privilege is given in relation to debts payable at the time the services or supplies are furnished the vessel, and it plainly negatives all implication that the lien reaches contracts of credit expressly extended beyond the term limited by the law. In such case the right of the creditor rests in his contract, and not in the remedies provided by the statute. He deals with the master or owner upon their personal responsibility alone, and not in view of privileges granted by the statute. Those privileges are clothed with limitations as to their continuance, inconsistent with the terms of this contract, which, when once lost, cannot be recalled and reinstated. (*The Stephen Allen*, MSS. 1830.*)

The petitioners are not, in my opinion, entitled to come in upon this fund under any lien or privilege attaching to it which can be recognised by this Court. They stand before the Court singly in the character of creditors of the master and owner of the ship.

* Since reported, 1 *Blatch. & How.* 180.

Remnants in Court.

It is further urged, that in marshalling and distributing surpluses and remnants remaining in the registry, the Court, in its discretion, may look at the substantial equity and justice of the claims to the fund, and especially as against the owner, withhold them from him, and award them to his general creditors. And that in this instance that claim to preference in favor of the petitioners is impressively equitable, and approximates to a legal lien, their debts arising from services and supplies to the ship, which added to her value, and augmented this fund produced by her sale. They deny the right of Quincy to the character of mortgagee in this proceeding, insisting that upon the evidence before the Court he was the real owner of the ship, and in the distribution of the fund must be limited to the equity of owner alone.

It was admitted by Quincy, in his answer to the bill filed by the bottomry holder, that the bill of sale of the ship taken in his name, although absolute on its face, was received and held by him only as security for a loan of money to Cameron. The decree, in this cause, treated him as mortgagee, and held the ownership of the ship to be in Cameron. As between them, accordingly, Quincy's standing in Court is that of creditor alone, and the Court will not, in this collateral proceeding, change the position or relationship of the parties to the action towards each other, or the proceeds of the suit. If the decision of that point may be re-examined here, it must be done directly, and by a formal suit, which will put the merits of the question in issue, and afford the parties to be affected by its decision the opportunity for a full hearing here, and the privilege of an appeal to the higher tribunals.

Remnants in Court.

Neither of those ends are attainable in an incidental motion or petition upon which no formal answer or issue is made. The action of the Court on this application is both discretionary and final. In my judgment the petition ought not to prevail on that ground, and Quincy must be considered, in this state of the case, entitled to have his mortgage debt satisfied out of the proceeds, it being equitably a lien upon them as the representative of the thing mortgaged. (*Moses v. Murgatroyd*, 1 *Johns. Ch. R.* 119; *Cook v. Mancius*, 5 *Johns. Ch. R.* 89; 2 *Gall. R.* 483; 5 *Peters' R.* 675; *Gilp*. 185-9, 549.) And the demand of the petitioners not being entitled to a lien on the ship, (*White v. Carpenter*, 2 *Paige*, 217,) cannot now come in with a priority of privilege against the mortgage creditor, and in that condition would not be recognised in the English Admiralty as entitled to payment at all out of the remnants in the registry. (3 *Hagg.* 129; 1 *Vesey, Sen.*, *R.* 154.)

As the mortgage debt will absorb the remnants in Court, it is unnecessary to consider the point discussed at the hearing, whether an unprivileged debt owing by the owner of a ship in the American Courts, can be satisfied by order of the Court, out of remnants in Court from her sale, belonging to the owner; that is, whether the Court has an equitable authority to apply such moneys to a general creditor of their legal owner, contrary to his desire and direction.

The application of the petitioners is denied, and the proceeds must be applied to the mortgage debt. There being no question before the Court as to the amount of the mortgage debt, no reference to a commissioner is necessary.

The Steamboat Narragansett.

THE STEAMBOAT NARRAGANSETT.

Damages caused by a collision will be awarded against the colliding vessel, adequate to the full recompense of the injured vessel and cargo.

The loss of the use of the injured vessel whilst undergoing repairs is so directly consequential to the collision as to be entitled to compensation.

The owners of the injured vessel will be allowed salvage expenses and other charges necessarily paid by them in rescuing the vessel and cargo from perils they were placed in by the collision.

Services of a salvage character, expended in saving and restoring the injured vessel and cargo, will be compensated by salvage rewards, and not limited to a *quantum meruit* for mere work and labor.

A *bona fide* adjustment of such claims and charges between parties interested in the vessel and cargo, will be accepted by the Court as a proper mode of fixing the value of the services.

The commissioner's report of damages, when parties have been fully heard before him with their proofs, and no question of law is involved in his decision, will be adopted by the Court, unless palpable errors or inadvertencies have been committed by him.

THE commissioner, in his report of the damages sustained by the libellants by occasion of the collision sued for in this cause, made allowances for salvage compensations paid by the libellants to other persons and vessels for aiding to save and secure their vessel and cargo wrecked by the collision; for all direct damages and injury to the sloop and cargo, and also the consequential damages sustained by loss of the use and services of the vessel during the time she was out of employment for the purpose of repairs, &c.

The claimants excepted to all these classes of allowances. The facts material to these points will sufficiently appear in the opinion of the Court.

F. B. Cutting, for libellants.

J. P. Hall and W. M. Evarts, for claimants.

BERRA, J.—The report of the commissioner made in the cause, pursuant to the decree of the Court upon the merits,* having been filed, the claimants excepted to it in various particulars, but more generally the exceptions call in question the amount of allowances stated than the principles adopted by the commissioner in making them.

The case was submitted to the Court on the evidence before the commissioner, and written arguments of the counsel. As a general rule, a commissioner's report of damages upon the facts only, will be adopted by the Court, unless errors or inadvertencies in his valuation are clearly established by the excepting party. It will be useless, in this case, to set forth twenty or thirty exceptions in detail, which these claimants have filed to the report. The essential ones will only be considered.

Exception is taken to the allowances of a salvage compensation made two sloops, (the Emperor and Elector,) employed by the libellants to assist in raising the wrecked vessel and cargo, and towing them into Black Rock harbor. It rests on two objections: first, that no salvage service was rendered by the vessels; and second, that the allowances are exorbitant as a *quantum meruit*.

The vessels were engaged in the service but a short time, and neither they or the crews were exposed to hazardous or severe services. These particulars do not, however, determine the character of the service, nor necessarily withdraw it from the class of salvage claims.

* See report, *ante*, p. 206.

The Steamboat Narragansett.

Judge Story held, in *The Emulous*, that whenever the service has been rendered in saving property on the sea, the service is, in the sense of the maritime law, a salvage service; (1 *Sumner*, 210;) and in a later case he adds, that compensation for such services is not to be estimated upon the footing of a mere *quantum meruit* for work and labor upon the dry principles of the common law, but upon the footing of a *quantum meruit* upon the enlarged principles and policy of maritime jurisprudence in salvage causes. (*Beamis v. 350 Pigs of Copper*, 1 *Story*, 325.)

The rule in the English Admiralty is of the same tenor.

Sir John Nicholl rewarded as a salvage service the taking of an anchor to a ship coming into the Downs, by a lugger under contract to procure it from Dover and put it on board the ship. The anchor was necessary to the safety of the ship in her then condition. The lugger encountered heavy wind in a dark night in taking out the anchor. It was objected that the service was slight, and not of a salvage character.

The judge held this a salvage service not to be paid for merely as work and labor; when fairly and honestly rendered, it is to be liberally rewarded without a minute inquiry into the *quantum* of labor. (*The Hector*, 3 *Hagg.* 90.)

In another case he says, salvage reward is not a mere question of work and labor—not a mere calculation of hours. (*The Industry*, 3 *Hagg.* 213.)

In *The Clifton* he enumerates the chief ingredients of a salvage service, some of which are prominent in the present case, with the reservation that where none or scarcely any of those ingredients exist, the compen-

sation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore*. (3 Hagg. 121.)

These cases present a succinct recapitulation of the doctrines which have always prevailed in this Court, and sufficiently mark the distinction between salvage services and pilot services, or ordinary services of work and labor.

In neither of the cases above cited was the situation of the salved property so perilous as that of the *Corinthian* and her cargo, nor were the services rendered greater in extent or hazard to the salvors or their vessels.

The Emperor and Elector had been laid up; crews had to be collected, to man and fit them for this service; yet they were made ready and got alongside the wreck within three or four hours after the first notice and application to them. This was mid-winter. The wreck was found, when the sloops got to her, capsized and filled with water, and by their assistance she was righted and towed by them into Black Rock.

The owners of the sloops attached the *Corinthian* at that place for their compensation, and their claims were adjusted by her master, with the approval of Mr. Jones, agent of the underwriters upon her, at \$800. Those parties thought the compromise advantageous to all concerned in the vessel and cargo.

An adjustment of salvage services by parties on the spot, who are dealing for their own interests, though not binding on parties not present or represented, will yet be regarded favorably by maritime Courts, as affording probably a safer rule of valuation than can be gathered from the depositions of witnesses.

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In view of the probable risk of the enterprise, and the value of the property saved, and the promptitude with which the succor was rendered, I am not inclined to disturb that adjustment. I concur in the judgment of Mr. Jones and the master of the wreck, that the arrangement was fair and just under the circumstances.

The exception to this point is accordingly overruled.

The exception to the second and third items, being allowances to the schooners Union and Dispatch, to each \$120, is in part well sustained. Those charges include a compensation for freight carried, and also for employment *per diem*, to search for the wrecked property.

The vessels cannot come in on the footing of salvors upon claims for unsuccessful efforts to rescue or find the wrecked property. Their charges must be limited to services rendered by them beneficial to the wreck. The contract made with them by the insurance offices to search for the wreck cannot rightfully be thrown on the cargo or vessel, when neither is proved to have derived any advantage from it. (1 *Cranch*, 1; 9 *Cranch*, 367; 4 *Wash. C. C. R.* 657; 1 *Sumner*, 417.)

I do not think the vessels should be restricted to mere ordinary freight; it is reasonable and proper, under the circumstances of their employment, to allow a *per diem* compensation for the time occupied in loading, transferring and re-loading the cargo. This was a special undertaking very different from the regular business of carrying freight; but, on the evidence, I consider \$15 per day a reasonable remuneration for the time employed transporting and securing the cargo, and raise the allowance in the report to that amount.

The Court does not intend, by this distinction, to dis-

countenance the employment of vessels by the day in efforts to aid wrecked vessels to avoid salvage charges by others; nor to suggest that those expenditures may not be taken in account on a general average between the ship-owner and freighters.

But I discover no principle which permits a charge to be laid on the vessel or cargo for a precautionary employment of other vessels, unattended with actual aid to the property in distress. Before these sloops discovered the wreck, she was safely in port, and their connection with it was to wait until the cargo could be unladen and transferred to them, and then to transport it a distance of seventy miles, to New-York. The testimony does not fix clearly the time the sloops were engaged in the carriage of the cargo, but, without creating the expense of sending the case back to the commissioner for new proofs to that point, I shall assume, upon the evidence before me, that four days to each sloop would cover all the time reasonably required in the service performed, and shall accordingly reduce the allowance of the commissioner in these particulars to \$60 for each vessel.

I think the exceptions to the allowance of items 4, 5, 12, 13, 16 and 17 are well taken.

The decree contemplates only the payment of salvage reward, and though in the mode of stating those charges some of them would appear to include services which might fairly fall under that head, yet the proofs do not specify the quality or extent of those acts, so that the Court can discriminate and apply a proper compensation to each. Items 4, 5 and 12 are of that character, and must accordingly be rejected. The other particulars embraced in those items, and the

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accompanying charges in 13, 16 and 17, not being any of them proved to have a necessary or just relation to the salvage of the property wrecked, must also be rejected.

The damages decreed against the steamboat compose a fund out of which each party sustaining losses is to take his proper share. The report appears to have been made up upon the assumption that the steamboat contributing this fund is also bound to pay the charges of settling between the common claimants their respective interests in it.

This is a mistake. The owners of the steamboat have no concern with, and cannot rightfully participate in that question.

Accordingly, they ought not to be subjected to any of the charges incurred in making that distribution.

The principle involved in the last exceptions allowed will also dispose of that to the charges of R. Gibbs, Jr., for travelling expenses. It is not proved that there was any necessary or reasonable relation between those services and the salvage of the wrecked property. Upon the testimony they are rather to be referred to the condition of the claims of the respective libellants and underwriters between themselves, and would more appropriately belong to general average allowances than salvage claims. These items are accordingly disallowed.

The exception to the allowance made for injury to sails, cordage bill, painting and rigging, in all, \$319 26, must be overruled. The testimony of Sheppard, Watkins and Hillman sufficiently supports these charges. The collision rendered it necessary to put this class of repairs on the vessel, and although the proof is not

positive that they no more than reinstated the vessel in the condition she was before collision, yet the moderate amount charged, and the proof that such reparations were necessary, is evidence enough, in the first instance, to support the claim, none being offered by the claimants tending to show an overcharge. (2 *Hagg. R.* 90.) I shall, therefore, allow that amount:

The last point in dispute is the allowance of five hundred dollars for the value of the services and use of the vessel lost to the owners whilst she was undergoing repairs. This is a subject for valuation and allowance, because the owner of the injured vessel is entitled to a full reparation of the injuries and losses caused by the collision. (9 *Wheaton*, 362; *The Appollon*, 2 *Hagg.* 30.)

Questions of consequential damages are necessarily vague in their nature. It is not to be expected that the evidence can fix with exactness the time indispensable for the repair of the injured vessel, nor where the work could be most advantageously done, or the value of her use to the owner during the period of her disablement. Those particulars must rest, in a good degree, upon estimates; and although there is a diversity of opinion with the witnesses, I think the conclusion adopted by the commissioner is reasonably sustained by the proofs, and accordingly I shall allow his report in this behalf to stand.

These rulings upon the exceptions will require \$559 05 to be deducted from the sum of \$2,147 87, reported payable to the libellants, and the decree will be entered in affirmance of the residue of the report, with costs.

The Steamboat Hudson.

THE STEAMBOAT HUDSON.

A master of a vessel is a competent witness for the owners in a suit in rem for wages by one of the ship's company.

A hiring at monthly wages imports that the engagement is by the month, terminable with each month, at the option of either party. If the party hired leaves before the expiration of the month, he loses the whole wages; if he is discharged before its termination, he recovers for the whole time.

The discharge of the crew by sale of the vessel on execution, is of the same effect as to their rights as the breaking up of the voyage or discharge of the crew by act of the master.

Debts or liabilities of seamen to the master or owner of a vessel for other cause than for misfeasance or non-performance in the duties of their position, cannot be set up against their demand of wages.

Admiralty does not take cognizance of set-off; but allowances may be made to the master or owner by rebatement of wages in compensation of losses or injuries incurred by them in consequence of negligence or fault of the mariner in the performance of his duties.

Quere. Whether the civil law action of *reconvencion*, or the remedy of *compensatio* or stoppage may be had in Admiralty?

THE libellant brought this suit for the recovery of wages as steward on the steamboat Hudson. He avers that he entered on board in that capacity on the 17th of February, 1846; that no contract was made as to the rate of wages, but that his services were worth forty dollars per month, and that the usage in that line of business is to pay stewards at such monthly rate for the entire season of ten months.

He avers that he was discharged the 24th of July thereafter, and claims a decree for ten months' wages at forty dollars per month.

The answer controverts these allegations, and asserts that the libellant was hired by the month and not by the season, served only from March 2d to July 24th,

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and that his services were not worth forty dollars per month; and that he earned, whilst on board, over and above all payments, fifty-one dollars and seventy-five cents, and no more; that the boat was sold under execution July 21st, and that the libellant was afterwards discharged by the purchaser and now owner. He further avers that libellant was at the time indebted to the boat for liquors sold on board, &c., during the previous year, when bar-keeper, in the sum of forty-one dollars and eighty-three cents, and that claimant tendered him fifty-three dollars before suit brought, and deposited the same in Court.

Haskett, for the libellant, contended that the contract was for the season.

That a judicial sale of the boat did not discharge the lien for wages, and that Charles J. Hodges, called by the claimant as a witness, was incompetent to testify, on the ground of interest.

Underhill, for claimant.

Hodges was competent; his testimony was adverse to his own interest. (15 *Johns. R.* 270; 16 *Id.* 70.) He also cited 7 *Adolph. & Ellis*, 544; 2 *East*, 145.

BERRS, J.—A preliminary objection was taken to the testimony of Charles J. Hodges, former part owner and manager of the boat, as a witness in this case, based upon his interest in the event of the suit. It was urged that he, as such owner, was personally liable on the contract, and would be obliged to pay the claim of the libellant, if not recovered of the boat.

He may have such contingent interest, but it would

The Steamboat Hudson.

be one against the party calling him, because he would be most benefited by casting the debt upon the boat.

Interests of a remote and uncertain character are not now regarded as disqualifying a witness; they go to his credibility alone. (5 *Hill*, 476; 1 *Phillips' Ev.* 32; *Cowen & Hill's Notes*, 131.)

The libellant has not, in my judgment, produced sufficient evidence to sustain the averments of the libel that his hiring was for the entire season, at \$40 per month; on the contrary, in the absence of direct evidence, the implication is, that his engagement was by the month, at monthly wages; and upon all the proofs I do not consider he ought to receive more than twenty-five dollars per month. This was the most the owner ever told him he would pay. The statement was made after the libellant had entered upon his duties on board, and was not controverted by him at the time.

The owner had said, if he discharged the libellant, and made another appointment in his place, he meant to allow him wages for the season, and supposed he should pay three hundred dollars. This was a gratuitous statement, not made at the time of any contract between the parties, nor in reference to any new action or engagement by the libellant. It is not sufficient, therefore, to support the suit, there being no consideration for it; and it is not proof of the terms of the past bargain, because it is put by the master on the supposition or contingency that he might remove the libellant, and seems to have been offered in the way of a consoling suggestion to the libellant in case his place should be taken from him.

The fair import of the whole evidence is, that there was no express agreement for wages, and that the libel-

lant entered into the business as a mere adventure, expecting to receive a monthly compensation for his services, at the rate the owners should consider them worth. This would be a reasonable and appropriate arrangement in appointing him to a situation of trust and responsibility, with the duties of which he was unacquainted. His recompense was not fixed at any price for a general term or period, but was to be a monthly *quantum meruit* whilst he continued to serve.

It is in proof that he was not well qualified for the situation, and I am satisfied there is no just foundation for his claim to a payment exceeding twenty-five dollars per month, for the time he was employed.

His action was instituted within a few days after he was discharged from the boat, and cannot be made to embrace more than the time which had then elapsed.

Unless the testimony is clear and unequivocal that the engagement was absolute for a season or definite period, a hiring, at monthly wages, will be regarded an engagement by the month, and thus leaving it optional with either party to terminate the obligation to serve or pay, at the end of the month. If it closes during the running of the month by the discharge of the servant, the master must pay wages for the month; and if by the servant, he loses the wages accruing on the unfinished term. (12 *Johns. R.* 165; 13 *Ibid.* 94; *Id.* 390.)

The discharge of the libellant in consequence of a judicial sale of the boat must be regarded the act of the owner, leaving her liable to the libellant to the same extent the owner would have been.

It was the duty of the libellant to prove clearly the time at which his services commenced. The evidence

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in, that he went on board the last of February, but the written memorandum of the then master handed over to the purchaser on the sale of the boat, makes it the 2d of March. The former master testifies that date was a mistaken one, yet is not able to supply the time with more certainty. The implication, under such circumstances, is not to be in favor of the libellant, and accordingly I should hold that the time of computing his wages begins with March and ends with July, giving five months payment, at twenty-five dollars per month, or one hundred and twenty-five dollars.

The \$41 83, alleged by claimants to be due to the boat by the libellant, for various articles had by him on board, cannot be regarded in this action. It at best could enure only by way of set-off, and the Admiralty does not take cognizance of cross-demands, unless they are parcel of the contract on which suit is founded, or tend to prove it imperfectly fulfilled, or performed in such manner as to be injurious to the party sued. (3 *Mason*, 161; 4 *Ibid.* 84.)

Here the debt claimed to be due by the libellant was incurred by him the preceding year, when he was employed on the boat as bar-keeper. It is alleged to be for the sale of liquors at the bar, the proceeds of which were retained by him, and for passages given his friends on the boat, all being matters of account or implied assumpsit, appertaining to actions at law and not to maritime suits, and the debt in no way arose out of or as connected with his employment on board as steward. The civil law afforded relief for counter or cross-claims of like kind, by an order of *compensation* or stoppage, (*Wood's Civil Law*, B. 3, ch. 9, § 5,) made in the *lis pendens*,

but that procedure has never gone into the Admiralty practice.

The action of *reconvention*, (*Wood's Civ. Law, B. 4, ch. 3, § 6,*) employed to the like end, might perhaps be allowable in Admiralty when the whole subject is within its jurisdiction. (*Dig. lib. 16, tit. 2, 1, 2, 3; 1 Pothier Analysis, Pandects, 165, verb "compensatio;" Code, lib. 7, tit. 45, art. 14.*)

From the amount of wages, \$125, is to be deducted the credit given by the libellant of \$35 paid to him; \$10, in his hands, admitted to have been received by him as steward, making \$45, leaving \$80, for which a decree must be rendered, with costs.

The \$53 deposited in Court will be applied in part satisfaction of the decree.

THE STEAMBOAT JOSEPH E. COFFEE.

A steamboat employed upon a ferry between the City of New-York and Bull's Ferry and Fort Lee, in New-Jersey, is a ship or vessel subject to a lien under the act of the State of New-York. (2 R. S. 493.)

Such vessel does not depart from the State within the meaning of the statute, so as to destroy the liens, by going from this port to the above places in New-Jersey and back again to New-York on Sunday, whilst her repairs are in progress and before they are completed.

The lien given by the act will not be lost or defeated by the vessel leaving the State fraudulently or clandestinely, at a time when the lien creditor could not legally arrest her.

Nor if she makes her departure on Sunday, or whilst the contract for labor, &c., upon her is in progress of execution and not finished.

THIS was a suit *in rem*, by a blacksmith, against the steamboat Joseph E. Coffee, for repairs and materials

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put by him on her, in this port, in July last, at the request of the then owner, Joseph E. Coffee.

The answer denies the existence of any lien. It alleges that the steamboat is a domestic vessel, and left the State after the services and supplies charged for were furnished, and before action brought.

It appeared in evidence that the boat was built for Joseph E. Coffee, who owned an iron foundry and steam-engine manufactory, conducted by his brother George. That after the work now sued for was done to the boat, Joseph E. Coffee failed and assigned the boat, and she afterwards came to the ownership of the claimant. She was built to run from New-York to Fort Lee and Bull's Ferry as a ferry boat. That the libellant's account of charges for making the steering gear for the boat closed on Saturday, the 18th of July, but his bill of charges was not rendered the owner until the 22d. That on Sunday, the 19th, by the owner's consent, the boat ran a trip to Bull's Ferry, about seven miles up the river, on the New-Jersey side, and she was there made fast to the wharf; that passage money was charged and received on the trip. She returned the same day to New-York and was taken to the Dry Dock, where the work of finishing her continued for several days, and early in August she was completed and put upon regular employment as a ferry boat to Bull's Ferry and Fort Lee.

It further appeared, by the accounts of the libellant rendered and not objected to, that he continued doing work and supplying materials for the boat up to July 22d. The libellant was employed to do blacksmiths' work upon the boat by Benjamin C. Terry, the shipwright, who had the boat in his charge, and was com-

pleting her at the time. The owner directed Terry to obtain the blacksmiths' work of the libellant. It was charged on the libellant's books to the steamboat and owners.

The cause was argued by G. A. Schufeldt, for the libellant, and C. Van Santvord, for claimant. The further facts, so far as important, are stated in the opinion of the Court.

G. A. Schufeldt, for libellant.

C. Van Santvord, for claimant.

BETTS, J.—In so far as Terry took part in ordering or procuring the work and materials for which the action is brought, he did not act in his own right as contractor and builder of the boat, but as agent of the owner expressly directed to obtain them of the libellant.

Terry's testimony, moreover, clearly proves that the owner did not expect the charge for that service was to be made by the libellant on his, Terry's, account, as both he and the claimant well knew Terry's contract had already been fully satisfied and paid.

The demand exceeding fifty dollars, this case, *prima facie*, falls within the statute of the State giving a lien for work and materials upon the vessels to which they are applied. (2 R. S. 405, § 1.) Section second of the statute declares, that "In all cases such lien shall cease immediately after the vessel shall have left the State."

This provision plainly imports that the departure from the State is to be made in the usual course of business, and cannot apply to vessels surreptitiously taken away.

The Steamboat Joseph E. Coffee.

Nor can the fact be of any avail when the vessel has been clandestinely run out of the State to defeat the lien.

The creditor who permits a vessel, subject to his debt, to leave the State in the regular course of her employ, or in such manner as to import that he has notice of her intended departure, would properly be presumed to have waived his lien. The law gives him the privilege so long only as the vessel continues within the State. This condition is vital to his right. Still it is an inherent quality of every condition dependent upon the volition and action of a party, that he shall not be prevented performing it by one to whose benefit the non-performance is to enure. (*Williams v. U. S.* 2 *Peters' R.* 102; *U. S. v. Arredondo*, 6 *Peters' R.* 746; *Whitney v. Spencer*, 4 *Cowen*, 41.) Any act of the owner of the steamer, with design to cut off or evade the lien, such as a removal of the vessel from the State in a manner rendering it impossible for the lien creditor to pursue his remedy against her, within the terms of the statute, or any fraudulent concealment or deceit hindering it, would interpose no bar to his right. Here the steamboat was run from this port across the State line on Sunday, a *dies non juridicus*, when no process could be issued against her, or be served if already taken out; and scarcely more than touching the Jersey shore on the opposite side of the river, her course was reversed, and she returned directly to this port again. If taking the vessel out of the port into another State was done with no purpose to withdraw her from the libellant's lien, but with intent to try her machinery or find a more commodious place to finish her, or on a pleasure excursion, in neither case would the rights of the libellant be prejudiced,

(*Hancox v. Dunning*, 6 *Hill*, 494,) especially as it does not appear the libellant had then completed his work or contract, and was in a condition to enforce his lien.

A part of his job, that of fitting on the steering gear, seems to have been completed on Saturday, but he continued his labors upon her the Monday and Tuesday following; on which day, being the 22d of July, he made up and presented his bill, certified by Terry to be correct, to the owner, who received it without objection, the boat then lying in this port. The account not being satisfied, this libel was filed, and the boat was arrested the 31st July, before she sailed from here on her regular employment.

It is contended by the claimant that the lien does not attach to ferry boats, and this vessel being used as a ferry boat is exempt from it.

The cases, 5 *Wendell*, 564, 17 *Johns. R.* 54, are relied upon to support this position. The case in *Wendell* has no analogy to the point now raised; the vessel there attached was a small, open, undecked boat, probably a row-boat. The decision in 17 *Johnson* was in relation to horse ferry boats, used on the ferry between New-York and Hoboken, and the Court held that ferry boats used between New-York and Hoboken were not the description of vessels contemplated in the act of February 28, 1817. That the act embraced only vessels navigating the ocean, or at most those sailing coastwise from port to port.

The doctrine declared in that decision is essentially qualified if not wholly discarded in subsequent cases, (*Walker v. Blackwell*, 1 *Wend.* 557; *Farmers' Delight v. Lawrence*, 5 *Wend.* 564,) which consider all vessels,

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not being row-boats, scows, or like small craft, included within the statute.

The first legislation of the State, giving a lien to material men, was in relation to foreign vessels only. The act of February 28, 1817, extended the lien to domestic vessels, but the Supreme Court, in 17 *Johns*. 54, were disposed to consider the provisions of the amendatory law as applicable only to vessels of like class with those coming under the original act. They gave emphasis to particular terms and phrases employed in the act of 1817, as limiting its operation to ships and vessels employed in navigation, if not upon the high seas, at least as coasters.

The Revised Statutes do not appear to indicate an intention to discriminate in respect to the dimensions or employment of the vessels which shall be subject to a lien.

The provision is most ample in its terms. Section 1 enacts, that "Whenever a debt, amounting to fifty dollars or upwards, shall be contracted by the master, owner, agent or consignee of *any ship or vessel*, within this State," &c.—language applying in all its terms equally to home vessels and small craft, as those of the largest dimensions and owned abroad.

The reason inducing these provisions would seemingly no less affect the one class than the other. The smallness of the debt which shall carry with it the privilege, and the notorious fact that mechanics are most usually engaged in furnishing repairs and supplies to home vessels of small value are evidences that the aim of the legislature was to protect the humble description of claims with no less care than those of greatest magnitude.

The Steamboat Boston.

Nor is it easy to perceive how the occupation of the vessel as a ferry boat can vary the application of the law. Steam vessels so employed are of great cost, and not uncommonly of a size sufficient for any other service. Such is the case with numbers constantly employed in this harbor, and on other waters of this State to serve ferries. The boat now arrested is constructed in build and size like ordinary passenger or freight steamboats, and it would be an extraordinary anomaly to hold she is subject to the lien if engaged as a freighter on the river, but must be discharged from it when placed on a ferry. Her cost, too, was probably four times that of a sloop of her tonnage. The decision in *Hancox v. Dunning*, 6 *Hill*, 494, brings such sloops within the lien act, and, upon parity of reason and necessity, this steam vessel should be included also within its operation.

The decree will be in favor of the libellant for \$123, with interest from July 31st, 1846, and costs.

THE STEAMBOAT BOSTON.

In a collision between two passenger steamboats, occurring at their place of departure, both starting from the same slip or pier at the same time, they will be mutually held responsible for the exercise of the utmost prudence and precaution.

Neither can lawfully press ahead of the other in getting under way, when it is apparent their movements are commenced simultaneously.

If they are competitor boats, running the same route, negligence or fault in producing the collision will be imputed equally to each, unless one clearly exculpates herself.

The law of this State imposes a penalty on a steamboat for attempting to pass another under way nearer than twenty yards, and the maritime law subjects them to all damages caused by crowding on vessels under way to pass them, or in crossing their bows.

The Steamboat Boston.

This Court will not allow costs on the arrest of a vessel for a small cause of action, when the party has adequate remedy in the lower municipal courts, and especially if the suit is prosecuted vindictively, and with a view to create costs.

THE steamers Frank and Boston, two small passenger boats belonging to this port, lay at or near the same wharf, in this harbor, and were in the act of going out together, their trips being appointed for the same hour. They were competitor boats, making frequent trips daily from Canal-street slip to landing places a few miles up the Hudson River, on the New-Jersey shore. There was great acrimony and vindictiveness of feeling subsisting between the officers of the two boats. In a struggle between the two to have the lead in getting under way on an up trip, they came in collision. The libellant's boat, the Frank, received injuries, which were repaired at the cost of \$21 27. This action was brought for the injuries, demanding large damages.

The facts attending the collision appear sufficiently in the opinion of the Court.

Geo. W. Stevens, for the libellant.

W. Q. Morton, for the respondents.

BUTTS, J.—This case is quite unimportant in a pecuniary point of view. It has, however, been contested with great earnestness, by proofs and arguments on the allegations that interests, important to this class of business conducted by numerous steam craft into and from this harbor, are involved in the controversy. The principal points in litigation are :

1. The relative rights and duties of such steamers in getting under way from their berths, when the hour of their starting is known to each to be the same.

2. Whether the injury in this instance was caused by the fault or negligence of the Frank or Boston, or neither or both.

3. Whether, if blame be imputable to the Boston, the libellant might not, with reasonable care and skill, have avoided the collision, and is not chargeable with fault in omitting to do so.

4. Whether the loss shall not be apportioned between the two vessels, because of the difficulty on the evidence in determining which one was most in the wrong.

The zeal of the litigant parties has been so far partaken of by the counsel as to call forth a labored discussion of every fact, and numerous authorities supposed to have a bearing upon the case. I do not, however, regard it as one which demands of the Court an extended exposition of its views upon the subjects debated.

The doctrines which obtain in Admiralty in collision cases are sufficiently collected, with the authorities supporting them, in the late edition of *Abbott on Shipping*, just published, (*part 3, ch. 1.*) and it will be needless to collate and expound the cases applicable to the merits of this issue, there being entire harmony in the general principles affecting this case, with perhaps the exception of the point whether the Court can order an apportionment of damages between the two vessels if unable to decide which one was most blameable for the injury sustained. That point will not come within the purview of the present decision.

It is not easy, upon the evidence, to determine which of the two boats, when the hour for starting arrived,

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first moved its wheels ahead. Both had their engines in action for a considerable time previously, as is the usage in preparing to get under way at a fixed time, working their wheels alternately a turn or two backwards and forwards, to get the positions from which they intended to start on the trip. The witnesses on each boat, who were taking notice of the proceedings, think the boat they were upon began turning its wheels ahead, whilst the wheels of the other one were backing or standing still.

Giving credit to them on both sides, the difference is so trivial, that it may be assumed that the two attempted to go forward simultaneously. A person standing on deck might thus, by his sensations from the leverage of the wheels against the water, be conscious that his boat was in the act of getting in motion before one, observing her a short distance off, could discern that her wheels had commenced revolving; or if so, which way they were turning.

I do not think that particular of essential importance. The Frank had been lying up beside her wharf slip, with her head towards the shore. She cast off her fastenings and backed out of the slip past the Boston, the latter lying at the end of a pier, with her head down the river. It was perfectly known on board the Boston that the movement by the Frank was for the purpose of getting a position outside the piers for starting on her course up the river. It had been usual for her to start in that manner.

So soon as the Frank left her berth, and had cleared the Boston, the latter loosened her fastenings at the end of the pier, and backed into the slip the Frank had left.

The direction of the boats towards each other, then, was at right angles, the Boston heading westerly and the Frank northerly, that being the course each was to start upon.

Witnesses differ widely in their estimates as to the distance the Frank was from the Boston when the latter commenced moving ahead; some say from one hundred to one hundred and fifty yards, and two pilots, not belonging to either boat, calculated they were sixty or one hundred feet apart when the Boston pushed out of her slip, the stern of the Frank then being about even with the end of the pier to the slip out of which the Boston was moving.

In this state of facts it is incumbent on the Boston to prove, beyond all reasonable doubt, that when put in motion to cross the Frank's bows, the latter boat was either backing off in another direction or her wheels were still, so that there would be no hazard of striking her, otherwise she must be responsible for running out when the slightest mistake as to the distance or action of the Frank would almost inevitably cause a collision.

But without laying stress on the want of such evidence, I regard the Boston clearly in fault for attempting to pass out of her slip whilst the other boat was manœuvering in such close proximity to get on her course, and might, in an instant, be under full way on it, and when a false move could hardly fail to bring the two boats against each other.

Under any circumstances, it would be deemed a want of due prudence and precaution to attempt to run a boat across the track another was known to be intending instantly to take, although not made certain at the time that she had actually made progress in it;

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and the blame that would be incurred in ordinary cases for an attempt so hazardous becomes more positive when there is manifestly a keen rivalry between the boats, each struggling to get the lead of the other. The boat first under motion in such cases ought not to be interfered with; and the one delayed in starting should be held to the exercise of every possible caution in following the movement of the other. The competition for the first starting or the earliest arrival might otherwise absorb all considerations for the safety of the vessel or passengers, and put both in imminent peril.

The law of the State prohibits, under a penalty of \$250, one steamboat approaching another under way, with intent to pass her, within less than twenty yards, (1 *Rev. S.* 682,) and the general principles of maritime law exact in the navigation of vessels, on all occasions, great prudence in attempting to pass each other, or cross the known direction either is taking.

I think the evidence is at least equally strong to show that the Frank was moving ahead when the Boston started, as that the wheels of the latter began first to move forward; but which ever way that fact might be, it must have been palpable to the master and pilot of the Boston that they run a bold risk in attempting to pass the bows of the Frank at the moment she must, in her state of preparation, be ready to move forward. They should, in the exercise of the most ordinary precaution, have stopped until that danger was past.

The duty of using special caution is cast upon her because she came out of her berth after the other boat was under way, and so near to her, that if the latter continued her course up the river, the Boston could not

probably, by any movement in her power, avoid coming in collision.

The attempt, then, to take the lead, was manifestly hazardous; and as it was made deliberately by the Boston, and not two minutes could have been lost to her had she waited till all danger was past, she is justly responsible for the damages occasioned by her precipitancy and want of circumspection.

I shall accordingly decree that she be condemned to pay the expenses of the reparation of the Frank, found to be \$21 23; but I shall not decree costs to the libellant.

No necessity has been shown in the case, which might have been tried by any magistrate, for instituting an action *in rem*, and creating the heavy expenses attendant upon attaching the Boston, and conducting the proceedings through this tribunal. It is the habit of the English Admiralty in salvage and collision cases, where a recovery is had by a libellant, to deny him costs, if there be any thing unreasonable or oppressive in his proceedings. (*Ship Moslem, ante p. 374.*)

I should have gone further and awarded costs to the claimants, had they, after the disaster, tendered all reasonable amends to the Frank.

There is too much reason to apprehend, from declarations given in evidence, that both parties have been actuated throughout the proceedings by hostile if not vindictive feelings towards each other. If the libellant is not justly obnoxious to that charge in respect to the action of his boat, he availed himself of the scintilla of right in his favor to urge her ahead, and compel the other to give way to him when a moderate degree of forbearance might have avoided the collision. It is

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the duty of the Court to guard watchfully against encouraging the exaction of rigorous advantages in favor of any party in the navigation of steamboats about the harbor. Life and property may be exposed to serious perils from the temerity or obstinacy of steamboat masters or pilots who may be willing to push a privilege to the most dangerous extremities, if assured they may have the countenance of the law in their recklessness.

Although, then, the judgment of the Court is, (1.) That it was the right of the *Frank*, on the occasion, to hold her way, and the duty of the *Boston* to have stopped hers; (2.) That the blame belongs to the *Boston* for not keeping out of the course of the *Frank*, and that she is liable for the whole actual damage caused by her failing to do so, with no equity to an apportionment of damages between herself and the *Frank*, there being no common fault between them other than their mutual jealousy and ill-temper towards each other; yet, because of the needless resort to the processes of this Court by the libellant, I shall award him his outlay for repairs alone, and leave each party to pay his own costs of suit.

Decree for libellant for \$21 23.

THE STEAMBOAT NEW-JERSEY.

Steamboats having greater facilities than vessels under canvas to avoid collisions when they are brought in proximity to each other, are bound to give way to sailing vessels when practicable, or take other proper precautions within their means for avoiding collisions.

But steamers are not bound to insure the safety of sailing vessels against their own negligence or misconduct. A sailing vessel is bound to exercise equal care, skill and prudence in passing a steamer as another sailing vessel; the only distinction being that in respect to a steamer, the vessel under sail is to adhere to her own course as far as practicable, and when so doing is not manifestly perilous to both or either.

A sailing vessel, suing a steamer for damages from a collision, must prove that the injury was not produced by her own negligence or fault; particularly that she did not depart from her course when near the steamer, without a clear necessity for so doing.

Loose declarations or admissions extracted from or freely made by portions of a crew directly after a wreck from collision, will have but slight weight in invalidating their deliberate testimony to the facts.

A vessel wrongfully or carelessly interposed in the track of another so as to render a collision inevitable to the latter, is responsible therefor the same as if the blow was given by her movement directly against the one striking her.

THIS was an action brought for the recovery of damages occasioned by a collision. The libellant, John H. Stebbins, alleges that he was the owner of the sloop Hamlet; that in the month of October last the said sloop sailed from the port of Bristol, on the Hudson River, on a voyage from thence to New-York, with a cargo of flagging and other stones on board; that she was staunch and well built, and of about ninety tons burthen; that she was proceeding at the rate of about four or five miles per hour until she arrived at a point on the Hudson River called Blue Point; that the wind then failed, and the sloop then proceeded, with the

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force of the current and very little wind, about one or two miles an hour; that those on board of the sloop then observed the steamboat New-Jersey coming up the river at the rate of about twelve or fifteen miles per hour, and nearer to the east shore of said river than the sloop; that the man at the helm was ordered to head the sloop more to the west shore of the river, which was done; that when the New-Jersey arrived near the sloop, she changed her course to the westward and headed across the bows of the sloop, and attempted to pass to the westward of said sloop, by means of which she struck the end of the said sloop's bowsprit, and carried away about ten or twelve feet of it, and the stays attached thereto, and forcing her round by the blow, struck her on the larboard bow with such violence that she sunk her with her cargo. The libellant further alleges, that it was impossible for the Hamlet to get out of the way of the New-Jersey, the sloop having little way on, and at the time at the westward of the steamer, and that there was room enough for the steamer to have passed to the eastward of the sloop; that by said collision the libellant has suffered damage to the amount of three thousand five hundred dollars.

The answer of the claimant admits the ownership, the voyage and loading of the sloop as alleged, but denies that she was well built and staunch; avers that she was not thoroughly manned, that the master was not on board, and no competent person in charge of said sloop. That the collision occurred about two o'clock in the morning, the steamboat, having a tow-boat of about two hundred tons burthen, was on the west side of the river, and westward of the course of the sloop; that

the steamboat had had a fair tide until a little time before the collision; the wind was from the westward, and blowing a stiff breeze before and at the time of the collision; that the steamboat was slowed, and was stopped about the time of the collision; that she did not cross the bows of the sloop, nor the course the sloop was running at the time the sloop came in sight; and further avers, that the collision arose from the short luffing of the sloop through the fault of those in charge of her, which those in charge of the steamboat could not have foreseen or guarded against, whereby the sloop was run into the steamboat. He denies that the sloop was running as slow as alleged after the arrival at Blue Point, or that the steamboat was running at the rate of twelve or fifteen miles an hour, or that the steamboat was nearer the east shore than the sloop. He further avers, that as the steamboat was passing to the west of the sloop, and the sloop coming down was passing to the east of the steamboat, the course of the sloop was suddenly altered, and so directed to the westward, as to run into the steamboat. He further avers, that the collision happened within the body of the County of Ulster or of Dutchess, and not within the Admiralty and maritime jurisdiction of this Court; that this Court has no jurisdiction of this cause of complaint.

The cause was argued by

Burr & Benedict, for the libellant,

F. B. Cutting, for the claimant.

The facts are sufficiently detailed in the opinion of the Court.

The Steamboat New-Jersey.

BARRA, J.—The proofs show that the sloop *Hamlet*, owned by the libellant, on her passage to New-York from Bristol, on the North River, came in collision with the steamboat *New-Jersey*, owned by the claimant, and was immediately sunk.

The occurrence took place in the night time, in October last, on the western side of the river, about half way between Blue Point and Sands' Dock, a mile or two below Poughkeepsie.

The sloop was heavily laden with stone; she had a fair wind, but light and unsteady, and was running nearly directly down the river, about one-third its breadth off the west shore.

The channel of the river at the place was half a mile wide, with flats each side of it extending a quarter of a mile, making the whole water surface about three-quarters of a mile in width.

The early part of the night had been thick and dark, and the wind strong from the north. At the time of the collision, the wind had much subsided; sailing vessels were floating upon a slack tide at the rate of from two to four miles the hour, and could be seen at a distance of from a half to a mile off.

The steamboat was proceeding, with one barge in tow attached to her larboard side, at a speed estimated on board to be six miles the hour, and by persons upon vessels she met and passed, at from ten to twelve miles.

The endeavor of the libellant has been to show that the steamboat was negligently headed across the bows of the sloop, and crowded so near to her track as to come afoul of her, and cause her loss.

The effort of the claimant has been to prove that the

steamboat was properly conducted, and that the sloop carelessly, or from mismanagement, was turned off her true course, and run directly upon the steamboat.

The laws of navigation impose no general duties or liabilities on steamboats in relation to collisions with sailing vessels not common between themselves, and to that class of vessels also; each is bound, under all circumstances, to use, with reasonable promptitude and skill, all the means in their power to avoid a threatened collision. (*Abbott*, 238, 311, 312, *Perkins' ed.*; *Carr. & Payne*, 538; 1 *Law R.* 313; 1 *W. Rob.* 157.) It is only because the means at command by steam vessels are so much more efficacious and ready than those possessed by sailing vessels, and that the consequences of an omission to apply such means are so immediate and destructive, that vessels propelled by steam are required to use the more watchful precautions, and to avoid vessels under canvas whenever it is plainly within their power to do so, without waiting for any correspondent exertions on the part of the sailing vessel. (*The Perth*, 3 *Hagg.* 414; *The Shannon*, 2 *Hagg.* 173.)

Yet the vessel under sail must contribute to the common security by holding steadily to her course, or take positive measures, if any are within her power, to prevent a collision, and avoid counteracting or embarrassing the steamer in the use of her powers to that end.

The owners of steamboats are not to be made insurers against the negligence, ignorance or misconduct of persons in charge of sailing vessels. If a collision occurs through the inattention, want of skill or blameable conduct of the latter, which the steamer, in the use of reasonable endeavors, could not avoid, the conse-

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quences must fall upon the vessel in the wrong the same as if both vessels were of the same description.

It thus becomes indispensable, in actions for damages by owners of sailing vessels against steamers, to prove ordinary care and skill on their part, and negligence or wilful fault on the part of the steamboat, though the latter may be liable to the implication of a delinquency when it might not, in like circumstances, be imputed to a sailing vessel which fails to avoid a collision.

The answer in this case sets up a state of facts which, if proved, would exonerate the steamer from responsibility for the injuries received by the sloop, because it in effect charges her with having departed from her proper course suddenly and run upon the steamer, or placed herself in the way of the latter.

A sailing vessel meeting a steamer is entitled, in all ordinary circumstances, to keep her way; but the privilege involves a corresponding obligation to adhere to that course, and thus give the steamer the opportunity to employ its superior facilities to secure the safety of both.

A change of direction by the sailing vessel, or manœuvre indicating the intention to change it, may embarrass the steamer, or prevent the use, in time, of the power to vary or stop her own way; and a collision so produced must be laid to the fault of the vessel and not to that of the steamer.

If, then, the allegation of the answer that the steamer was on a course which would have carried her clear of the sloop had not the latter abruptly luffed, and thus come unexpectedly across her track and into her, had been supported by the proofs, it is clear that she would not only have been acquitted on this libel, but would

be entitled to prefer her own claim for damages so sustained.

I do not propose to spread out the testimony in detail; the result of it, in my opinion, is that the claimant's own witnesses contradict the answer in two particulars of considerable moment in a question of culpable inattention or misconduct; first, in proving that the steamer crossed the track of the sloop in full view, and less than a third of a mile from her bows; second, in proving that the steamer had not been previously on the west shore; and third, upon the whole evidence it is at least doubtful whether the steamer was not in the act of crossing the river from the east shore, steering westward, when the collision occurred.

The testimony of the two men on board the sloop, strongly corroborated by those on board other sloops in the immediate vicinity, and who saw the position and course of the steamer and sloop, is positive that the steamer stood in a direction across the bows of the sloop in a course from the east to the west shore.

It also very satisfactorily appears, from a comparison of the testimony of these witnesses, that the steamer did not, as is asserted in the answer, commence her course from the eastern shore to the western, at a point from one-half to three-quarters of a mile further down the river than the place of collision; because all the testimony is that her course was up the river, diagonally across, and the diagrams render it certain that the steamer could not have been on the western shore rounded to up the river, when the pilot observed the sloop luffing one-third of a mile off.

The pilot of the Washington supposed the steamer had time, after she began crossing, to get to the west-

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ward of the sloop, and head up, before reaching the place of collision. He was, however, half a mile below; and after he fell into her wake, he pursued her course, and judged it would bring him over at about Blue Point, which is proved to be as far north of the place of collision as Sands' Dock is south of it.

I am satisfied, that giving due weight to all the evidence, it is proved that the collision occurred whilst the steamer was going towards the west shore, and before she had passed the sloop and got to the west of her. This necessarily places the steamer in a culpable position, attempting to cross the track of a sailing vessel and run under her bows, when she was entitled by law to hold her course, and it was the business of the steamer to leave it free to her.

The actual collision, as described by eye witnesses, and as far as it can be judged from concomitant circumstances, was not produced by any misconduct or want of care on the part of the sloop.

The answer charges it to have been produced by the sudden change of the direction of the sloop from eastward down the river to westward towards and directly upon the steamboat.

The pilot of the steamer is the only witness called to support the answer to this point. He describes two movements of the sloop into the wind, (or luffing,) which brought her upon the steamer. He says he first saw her a mile or more ahead, and laid his course to clear her; and if she had continued the course she was then pursuing, there would have been left him one-third the breadth of the river west free. The sloop was coming straight down the river, and when one-third of a mile from him, she changed her direction, luffed, and

bore more for the steamer. He might have gone clear, notwithstanding, had she adhered to the new course; but fearing she would not leave him room, he slackened the speed of the steamer, and hailed her to keep away; then stopped the boat, and repeated the hail; the man at the tiller immediately shoved down the helm, which luffed the sloop directly into the wind; at the instant that movement was made, he rung the bell to back the steamer, and the sloop came, head on, hard into the steamer.

This statement was not materially varied on cross-examination. He was still more emphatic that the sloop luffed twice, and added that he backed his boat twice, once at the instant of collision and again to keep clear of the sloop after the collision.

The pilot is confirmed as to the working of the machinery by the engineer of the boat; and the declarations of the two men on the deck of the sloop, made on board the steamer that night and immediately after the sloop sunk, are proved, in which they represented that the sloop had luffed once, and the man at the helm said he had orders from the forward man to luff again, and at the same time to bear away.

I do not regard these declarations of much moment if entirely credited; but the hasty assertions of men under such circumstances, in the confusion and fright of the moment, and in answer to the kind of questioning which most likely would take place, would weigh very slightly against their deliberate statements, when collected in mind and not appearing to testify under any bias or prejudice, and not discredited in character.

The intrinsic evidence, it appears to me, is very cogent against the representations of the pilot.

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The relative and actual speed of the two vessels is given as matter of conjecture, and no dependence can be placed on either for accuracy.

The witnesses of the libellant estimate the speed of the steamer at ten to twelve knots; the engineer supposes she was not going over six or seven, and the pilot judges the speed of the sloop much greater than any person on board her, or sailing in her company.

Assuming, however, a reasonable medium, and that the united speed with which the two vessels were approaching each other was ten miles the hour, they would strike in two minutes from the time the pilot saw the sloop luff. The engineer estimates that as the time occupied in giving two signal bells.

No evidence is given that a sloop deeply laden, and scarcely more than floating with the current, could be brought, in two minutes, by any action of her helm, from a direction heading down the river and bearing eastwardly, to one westward and at right angles with a steamer running up the river. The inherent probabilities are forcibly against such supposition.

But that statement does not present the full force of the presumption against the statement of the pilot; for he testifies, that after his boat was stopped, the helm of the sloop was shoved down, which luffed her, in his words, "*directly round,*" and brought her into him nearly head on.

The sloop must have been, at that moment, standing down the river in a direction opposite to his, and close beside him, to enable him to see so minute a manœuvre in a dark night, and it would require great weight of evidence to convince the mind that she could have been brought instantaneously round under

the circumstances, on her heel as it were, so as to be driven into the steamer.

The men on board the sloop state, that when the steamer was observed stretching over from the east shore, and making for the sloop, she was luffed some to give way for the steamer to pass under her stern, and was then steadied, and was holding her course down the river as the steamer crossed her bows and struck the bowsprit.

The pilot of the *Eliza Wright*, and captain and pilot of the *Van Buren*, both near the *Hamlet*, confirm this testimony. They all testify that the steamer was crossing the river west, and west northwest; she ran down to the *Eliza Wright*, and a light being shown from that vessel, she sheered more west, and attempted to run under the bows of the *Hamlet*, about half way between the *Eliza Wright* and the shore, and struck her bowsprit. This was within two minutes after passing the *Eliza Wright*.

The *Van Buren* was a few rods in rear of the *Hamlet*, running in her wake, and the captain and pilot give the same statement of the course of the steamer, and say the *Hamlet* was steering directly down the river when the collision occurred.

The captain of the *Excelsior*, the first sloop passed by the steamer after her direction distinctly made to the west, says she ran close to him, so near that he thought she was coming into him, and that he kept his eye on her till the collision, apprehending, from her course west and northwest amongst sloops in that part of the river, she would run foul of some one. He also testifies that she was bearing west at quick speed when he heard the crash.

The claimant contends that the manner the bowsprit of the sloop perforated the steamer demonstrates that the blow was given by the sloop, and at almost right angles, and outweighs the opinions and conclusions of all the witnesses as to the course of the steamer being across the river, and confirms the statement of her pilot that it was, on the contrary, up the river.

I do not perceive how that consequence follows. The blow would be nearly perpendicular to the steamer on the hypothesis of their witness, as she was crossing the track of the *Hamlet* nearly at right angles, and must necessarily have the same effect in that position of the vessels as if reversed, and the steamer was heading up the river and the sloop across it. More force would probably be given the blow if the sloop held her way upon the wind and current than if driven against the steamer after being luffed round.

Either mode of contact would account for the effect produced, and it cannot accordingly be assigned as exclusively necessary to either.

Nor is the question of the responsibility of the steamer affected by the fact that she received the blow, and was not directly the impinging body.

She wrongfully placed herself under the bows of the sloop in her track, and when the sloop could by no manœuvre avoid a collision; and she is in law answerable for the consequences the same as if her motion had been immediately upon the sloop.

Negligently or unskilfully interposing one vessel in the path of another, which the latter is entitled to hold, and under circumstances preventing her extricating herself, renders the collision and the injury consequent upon it the wrongful act of the vessel so interposed.

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It was the business of the latter to get out of the way of the former. (2 *Dods*. 83; *Story on Bailments*, § 611; *Abbott, Perkins' ed.* 307.)

The sloop, in this instance, was sunk by the collision, and went down almost instantaneously. I think the proofs fasten the blame on the steamer, and she must accordingly be held responsible for the entire loss sustained by the libellant.

The special fact ought not to be overlooked, that the steamer was running in a dark night, at her ordinary speed, amidst a thicket of vessels, without its being shown that any person on board her was on the lookout except the pilot at the wheel, or that any other person was at the time on deck. This was a most culpable want of precaution in her navigation.

The decree must be entered condemning the steamboat in the damages inflicted by the collision, and it will be referred to a commissioner to ascertain and compute the amount.

The Santa Claus.

THE SANTA CLAUS.

In an action *in rem* for a collision, the answer of the owners of the colliding vessel admitting facts to their prejudice will prevail in favor of the libellants against the testimony of the pilot of the vessel to the contrary.

There is no positive provision of law compelling a steamboat running on inland waters in the night time, to carry two signal lights, one in her bows and the other suspended above the deck at her stern.

The practice is an usual and useful one, and the omission to set them will be evidence of culpable negligence in the complaining vessel; but if the pilot of the colliding vessel discovers her bows and heading, the absence of a head light upon her is no excuse for the collision.

The rule that two steam vessels going in opposite directions, and meeting in the night time, shall each port her helm, and both pass to the larboard, is not of absolute obligation.

When one steamboat is ascending a river at her larboard side, within sixty or seventy feet of the shore, and another is descending on her starboard so far off as to leave ample room for her safe passage, the two are not so meeting, within the sense of the rule, as to justify the descending boat attempting to run in shore of the other, or to require the latter to port her helm and steer to the starboard.

A propeller, heavily laden, going up the Hudson River in the night, against an ebb tide, is justified by the usages of the river navigation, and upon general principles of marine law, to hug the western bank at or near Dunderbarrack Point, for the advantage of an eddy or slacker tide supposed to be found there, and other boats passing in the opposite direction are to be presumed cognizant of such usage and opinions, and are bound to take precautions accordingly.

The question of culpable negligence is not determinable absolutely by any rule of navigation. These rules are not inflexible, and a vessel which adheres to them in form may still be, at the same time, guilty of a tortious injury to another which fails to observe them.

THE passenger steamboat *Santa Claus*, going down the Hudson River, and the iron steam propeller *Ocean*, proceeding up the river, deeply loaded with coal, came in collision about twelve o'clock on the night of the 5th of June, 1846, a quarter of a mile above Dunderbarrack Point, at the foot of the Horse Race.

The Santa Claus.

The larboard guard of the Santa Claus was broken up, the outer timber wrenched off and driven nearly through the propeller, breaking a hole in her starboard bow, and was found passed athwart her seventeen feet under her upper deck. The Santa Claus received great damage in her guard timbers, wheel paddles and arms.

The owners of the propeller attached the steamer, claiming compensation for the injuries caused by the negligence or want of skill of the persons managing her.

The case set up by the respective parties by the libel and answer is this :

The libel alleges that the propeller is owned in Philadelphia, is of 190 tons burthen, and sailed from that port for Albany and Troy, on the 4th of June ; that on the night of the 5th she was violently and carelessly run into by the Santa Claus, about forty-two miles above New-York, a few rods above Dunderbarrack Point, the propeller then having two signal lights burning, one at the stem and the other at the main gaff ; that the blow made a breach in her starboard bow, six feet in length by three feet in width.

That the tide was ebb and strong and wind ahead, and the propeller was not making headway exceeding four miles the hour ; that to avoid the strength of wind and tide the propeller was kept close to the west side of the river, not more than three or four rods from the shore, after leaving Caldwell's landing.

That on doubling Dunderbarrack Point, the Santa Claus was discovered coming down the river one-third across from the eastern shore, and apparently heading directly down the reach, on a line far eastward of the propeller and her course. That the propeller continued close to the west shore, till observing the Santa Claus

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had suddenly changed her course and was apparently heading directly for the propeller, when her helm was put hard a port, and her engine was stopped and backed, so that her headway became entirely deadened, and her engine kept rapidly backing when the Santa Claus ran upon her at high speed, striking her on her starboard bow with the larboard bow of the Santa Claus, causing the injuries before specified.

That the propeller was at the time on a proper, safe and usual course in navigating that portion of the river, and did every thing promptly which ought to have been done to avoid the collision, and that it was out of her power to do so; but the Santa Claus, with ease and safety, could have avoided the collision if those navigating her had not unskilfully and negligently steered across and upon the bows of the propeller; and that the damage was occasioned by the fault and mismanagement of the Santa Claus, and not that of the propeller.

The answer denies generally the statement of particulars made by the libellants, and avers that the facts were—That at about midnight of the 5th of June, the Santa Claus was running down the river on the usual and proper track and course, with an ordinary head of steam, and at the rate of from twelve to fifteen miles the hour, and at a quarter of a mile above the turn of the Dunderbarrack, her pilot discovered the propeller below, half a mile to the southward and eastward, and three or four hundred yards from the western shore, having one light elevated above her decks, two masts, and her sails down, and he supposed her a vessel at anchor, her head being up the river.

That the pilot and crew of the Santa Claus did all

in their power, and exercised proper and due vigilance and skill to avoid the collision, and that it was caused by the wilful ignorance, carelessness and negligence of the master, pilot and crew of the propeller. .

That it is usual and customary, and the law of the river for steamboats going up in turning Dunderbarrack Point, to keep well to the eastward, so as to leave room for boats coming down to make that turn in safety; that the pilot of the propeller failed so to do, but headed to the northward and westward in violation of his duty, &c., &c.

That steamboats meeting on the river are each bound to port their helm and turn to starboard or the right, so as to pass with safety to the larboard of each other, but the pilot of the propeller ignorantly and carelessly neglected so to navigate his vessel; but on the contrary, starboarded his helm and steered to the larboard.

That the propeller was bound by law and the usage and custom of the river to carry and show two sufficient lights, one at her stem and the other raised above her stern, but that she had at the time no light at her stem; and that at the time of the collision she was widely out of her proper track and place.

The answer also charges the ignorance and incompetency of the pilot and crew of the propeller.

The points contested upon the hearing, and to which numerous witnesses were examined, turned chiefly on the inquiry whether the propeller was guilty of culpable negligence on the occasion which caused the collision complained of. Those charged against her related to her position in the river and her proximity to the western shore, and particularly to her omission to display a stem and stern light; and that running with

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only a light hoisted above her stern disabled the Santa Claus determining how she was heading, and from taking proper measures to avoid her.

Much time was consumed in taking proofs on that branch of the defence. It was overlooked on both sides, until the evidence had closed and the argument was opened, that it was stated in the answer "that the pilot (of the Santa Claus) discovered a vessel with two masts and her sails down, distant about half a mile to the southward and eastward, and about three or four hundred yards from the western shore; he supposed it to be a schooner at anchor, *her head* being up the river." This dispenses with the necessity of setting forth in detail the evidence given to this point by both parties.

It was regarded a cardinal fact, touching the condition and navigation of the propeller, to ascertain whether she was so fitted and conducted as to render it uncertain to the approaching vessel how she was heading, and the explicit declaration of the claimants in their answer that the pilot knew her head was up the river being considered by the Court conclusive against them on that point, the evidence at large is omitted.

The other facts in the case will sufficiently appear in the opinion of the Court.

E. C. Benedict, for libellants.

Geo. F. Schufeldt, for claimants.

BETTS, J.—The libel and answer stand in flat contradiction in respect to the courses and positions of the

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two vessels immediately preceding the collision. The statements in these pleadings do no more than form issues between the parties upon all the material facts connected with the transaction, except in one particular, in which the answer makes an allegation affording evidence in behalf of the libellants, which, in my judgment, disposes of that branch of the controversy.

The proof is pretty satisfactory that the propeller had but one light burning at the time she was first seen from the Santa Claus. The one placed at her bow, as the night came on, had burned out, or was extinguished without the knowledge of her crew, when the two vessels came in sight of each other.

The testimony of masters and pilots experienced in the navigation of the river prove clearly that placing one light above the stern of a steamer, and another in her bows, is of essential aid to vessels meeting her in determining her true position and course. The law requires at least one light to be plainly exposed, (*Act July 7, 1838, § 10,*) and the practice of exhibiting two in the above arrangement has become so general as to authorize the presumption that navigators will be governed by the expectation that all steamers in motion in the night time conform to it.

The necessity or value of this trim consists in its furnishing a sure means to vessels nearing her to determine the direction of her head. This the experts almost unanimously testified could not be ascertained by the stern light without the aid of a head light. The omission of that signal, without other equivalent warning, would, in my opinion, show the propeller guilty of negligence or misconduct, and would excuse the Santa Claus in not employing higher care and precau-

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tion for avoiding her. (*Bullock v. Steamboat Lamar*, 3 *Law Rep.* 275.)

That ground of defence is taken from the claimants by their answer, and they must be held to have known the position and direction of the propeller, as well from seeing her stern light and the direction of her head or bows, as if a light had been at her stem also. Steamers are not required by positive law, nor any authenticated custom of the maritime law, to carry and exhibit a light both on the stem and stern when running in the night time. It has become a common and commendable practice to do so, particularly in the navigation of inland waters, as an increased measure of precaution. It would undoubtedly, in this instance, have afforded the Santa Claus a better means, in connection with the stern light, to determine the bearing of the propeller than she could derive from the exhibition of a stern light alone, and that, in a nautical point of view, is all the importance of having *two* lights. The act of Congress (*July 7, 1838*, § 10,) compels steam vessels to carry one or more signal lights at night. No edict of any maritime code is shown requiring more than one to be exhibited. And it is of no consequence whether any light is shown, if the approaching vessel has plain notice without it, of every thing its exhibition could communicate. Here the pilot of the Santa Claus saw the bow of the propeller. That supplied him a range line to her stern, and thus apprised him whether she was at anchor swinging on the tide, or moving towards him on a direct or oblique line.

The only essential fact, then, to be determined is, whether the propeller was in a wrong position, or was unskillfully or carelessly navigated in reference to the

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course and position of the *Santa Claus*. If, however, the claimants became in that manner apprised of the heading of the propeller, the blame of the collision would be cast upon them, leaving no ground of excuse because notice was not given of her direction by a signal light at her head. The maritime law settles no determinate course or direction vessels are bound to take when approaching each other. The exigencies of the particular case must govern. There are general rules of navigation which furnish guides on ordinary occasions, but they do not necessarily excuse or charge fault or liability in all cases of collision.

One of those usages and rules is, that steamboats running in opposite directions shall, when meeting on coincident or approximating lines, port their helms or bear off to starboard, and thus give each other a berth to larboard. The usages in the United States and the Trinity Rules in England recognise this mode of navigation as the proper one to be pursued, and a deviation from it will raise a presumption of want of skill and good conduct in the vessel committing such deviation. But none of those rules are absolutely inflexible. They give way and accommodate themselves to emergencies as they arise. They are employed as standards by which Courts of Admiralty regulate, in a general sense, their appreciation of the care, skill or fidelity with which the respective vessels have performed their duties in case of a collision. (*Westminster Review*, No. 42, Sept. 1844; 3 *Kent*, 230; *The Hope*, 1 *W. Rob.* 157; *The Friend*, 1 *W. Rob.* 478; *Abbott*, 308.) And this State has, by statute, established a like provision. (1 *R. S.* 682, § 1.)

It is not definitely settled what the hearing of ap-

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proaching vessels must be towards each other to constitute a *meeting*, within the legal import of the term. It probably would be understood to signify, that when the advance of the vessels in a common direction which must apparently, if continued, bring them into collision, each must then change her course by bearing off to the right, or show adequate reasons excusing that movement.

The purpose and spirit of these laws of navigation aim at the safety of the vessels. The method designated is wholly secondary, and every rule is satisfied when the vessels go clear, although they pass each other on the starboard side and in near contiguity. (*The Friend*, 1 W. Rob. 478.) It is eminently proper that a strict observance of any of these regulations should be avoided when there is a plain risk in adhering to them, and it is entirely in the power of either vessel to escape a collision by departing from the methods prescribed by the rules.

But I should think this a case in which the customary mode of porting the helm was properly adopted by the *Santa Claus*, provided the evidence showed that the two boats were meeting in the sense of the rule, when she bore off to the right.

In the agitation and confusion necessarily attendant upon a collision in the night time, it must always be difficult to determine, with reasonable certainty, how either vessel was conducting at the moment, or what would have been the best measure either or both could have pursued in the exigency to avoid or lessen the danger.

In the present case, when the danger of collision was discovered to be imminent, the two vessels were

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crowded towards the west shore, the persons on board of each believing the other vessel was furthest out in the river, and pressing on them from that direction.

It is testified by the pilot of the *Santa Claus* and several hands on board her, that they observed the propeller down the river, east of their course, and heading westwardly towards them, and they ported their wheel once, and quickly repeated the movement, pressing it down until their boat was brought within fifty feet of the west shore, where the propeller drove into her, bows on, just abreast her wheel guards, and fifty feet aft her stem. It is incredible that those witnesses could have been aware of the nearness of their vessel to the west shore when they made that movement, for it involved her inevitable destruction had she not been intercepted by the propeller. She was arrested in full speed at fifty feet from the shore. Nothing in her power to do could have saved her at that point from going head on upon the rocks.

The pilot, engineer and firemen of the propeller testify that the *Santa Claus*, immediately before the collision, varied her course from one straight down the river and well east of them, to the starboard, and directly towards them, and came down upon them whilst they were endeavoring to escape her, just passing her stem across the propeller, and striking her starboard bow with the larboard guards of the *Santa Claus*, and with such force as to break off the facing of her guard and drive it entirely through the propeller.

The disaccord in the opinions of the witnesses as to particulars connected with the collision would naturally

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arise from the perturbation of the moment, and the different positions from which objects were viewed by them, and the Court might be compelled, if the testimony was confined to the facts observed when the vessels were in the act of striking, to regard the fault as inscrutable, or equally imputable to both parties. But it seems very plain to my mind, from all the circumstances in proof, that the pilot of the *Santa Claus* mistook the position of the propeller, from the time he first observed her, and that her position and course was always westward of his position and course, and not to the eastward, as he supposed, and under that misapprehension he made the desperate attempt to crowd his vessel between the propeller and the shore, thinking, no doubt, he was several hundred yards east of it.

The testimony of Babcock, May and Bradley, on board the propeller, is positive that she was running close to the west shore, within a distance of four or five rods. The pilot states that he hugged the rocks as near as was safe. This evidence is corroborated by Peter Van Elton, who observed the progress of the boat from his vessel, (anchored near Caldwell's;) he says, "she sheered in near Caldwell's, close to the shore, and kept close round the point, going round it a short distance from it.

Although Morey, pilot of the *Santa Claus*, Conklin and Turner, who were in the wheel-house with him, and Hubbard, a deck hand, all testify that the propeller, when seen by them, was three or four hundred yards eastward of the point, (or one-third of the width of the river,) and east of the *Santa Claus*, so far as to leave ample room for the latter to pass to the west, yet this is only matter of opinion and estimate; they

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point to no fixed objects which enabled them to form that judgment or verify its justness.

The answer is probably incorrectly copied in stating "the Santa Claus was a *quarter of a mile above the turn*, (at the point,) when she discovered the propeller, about half a mile to the southward and about three or four hundred yards from the western shore," because the testimony of the pilot and other witnesses speaking to that fact all represent the Santa Claus as one-half or a mile above the point when they discovered the propeller to be in motion, and they allege the collision actually took place a quarter of a mile above the point. This must manifestly be what the claimants intended to aver in their answer.

The preponderance of evidence upon these statements is clearly with the libellants. Their witnesses, all on the propeller but one, speak with certainty as to her position in relation to the west shore, a line of land almost within their reach, whilst those of the claimants were out in the river upon a vessel moving rapidly, and they judge from the apparent bearing of a high light, distant from them half a mile or a mile, and looked at in the night time in thick weather. In these circumstances it would be more probable they would mistake largely her distance from the shore than that her officers and crew could.

The facts proved on both sides, moreover, support the superior accuracy of the libellants' witnesses on this point.

The vessels came together eighty rods above the point, and only fifty or sixty feet (between three and four rods) from the west shore. They were running at the relative speed of four to one, the Santa Claus going twelve to seventeen miles the hour and the pro-

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pellor three to four, and accordingly the former would come down the river a mile whilst the latter was ascending a quarter of a mile, and assuming that the Santa Claus was at either point of distance testified to by her pilot and crew, above the place of collision when she sheered off westwardly, it would be physically impossible that the propeller could have advanced up the river three-quarters of a mile, and westwardly three or four hundred yards, during the time the Santa Claus, at her high speed, was descending one-half a mile or a mile.

The direction of the propeller westwardly, observed by the Santa Claus, could not have been, therefore, as supposed on board the latter, a course commenced whilst the former was still below, and several hundred yards east of the point, but must have been, as described by the pilot of the propeller, her direction on turning the point of rocks and hugging close to the west shore, which, according to the chart and diagrams of the river in proof, would necessarily lead her to steer and head N. W. and W. N. W.

It is palpable that the pilot of the Santa Claus must have miscalculated the distance of the propeller from him and the shore, when he made his sheer west, and followed it by a second one to counteract her bearing in that direction. His movements made after he had passed Van Wagenen's Island would, consistently with all the testimony, account for his intercepting the propeller at the spot the two vessels struck.

The diagrams and the line of courses described by the different experts, and concurred in by those managing the Santa Claus, connected with the testimony in the cause, demonstrate, to my judgment, that the error

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was wholly on the part of the Santa Claus, and that if she had not sheered to the west, but had held the course she had been running to the moment of porting her helm, she would have gone widely to the east of the propeller, or, had only one sheer been made, would have cleared her. A slight angle of deviation to larboard, commenced three or four hundred yards off, would certainly have brought the Santa Claus east of the track of the propeller; because she had been worked round at right angles to the shore when brought into collision, in running less than that distance on her sheer to starboard. The effort to get the shore side under a wrong impression of the true distance and course of the propeller, thus brought the Santa Claus almost perpendicularly across the path of the latter; indeed a tangent further round, for her port guards struck the starboard bow of the propeller.

The true position of the two vessels relative to each other, and their respective movements being thus ascertained, the remaining inquiry is, whether the propeller had wrongfully placed herself in the way of the Santa Claus, or, which is the same thing, whether she was blameable for not going to the eastward of the latter.

The lights of the Santa Claus were distinctly seen when she came round the Nose, by the pilot of the propeller, the latter then being off the point of rocks, probably from one to two miles distant from the Santa Claus. He had before determined to run close to the west shore, and accordingly took no precautions in respect to the Santa Claus, leaving her an abundant breadth of channel to the east.

Admitting that the two vessels were at that time on

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the same north and south line, on the track proper for the *Santa Claus* to pursue, and which the pilot of the propeller was bound to suppose she would hold, was he required to go east of that line, so as to keep the *Santa Claus* on his larboard side, or could he justifiably course up along shore west of it?

The usage or law is by no means peremptory or inflexible, that steamboats shall each steer to the right when approaching and meeting on the same track. Like other general rules this must yield to the necessities and reason of particular cases, even when the vessels are brought into dangerous proximity, and each relies upon the other that her movements will conform to that rule. (*Abbott*, 311, 312, § 4.) Reefs or shoals, or other impediments in the way, eddies, currents or tides may impede or prevent one vessel observing the rule on her part, and cast on the other the duty of avoiding her; or she may take a course opposite to that indicated by the rule when there is reasonable ground to believe such proceeding necessary to her safety or more secure navigation.

In the case of *The Friends*, Dr. Lushington discusses the effect of extraordinary contingencies, and holds that they must afford exceptions to the standing rule, however positive its terms may be, and in that case admitted a vessel, though out of the required course, to recover damages sustained from a collision in that situation. (2 *W. Rob.* 485.) A circumstance adverted to as of weight in that case also exists in this, that the vessel was deviating from the course prescribed by the rule of navigation with a view to a more favorable state of tide.

The testimony of the pilot of the propeller is corroborated by that of experts upon the river, that in a

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strong ebb-tide there is a species of eddy or reaction of tide close in by Caldwell's or the point, which aids a vessel ascending; and even if this was a mistaken opinion, the pilot should be presumed to have acted under an honest persuasion that such was the fact, and to have passed close up the west shore to avail himself of that advantage, his vessel being heavily loaded and of feeble propelling power.

This consideration would be of weight to show that he was not proceeding negligently and improvidently in that direction, but I think the fair weight of evidence proves an advantage was to be obtained by him in that mode of navigation, and it was the duty of the *Santa Claus* to have anticipated that slow vessels might be found at such state of tide in that locality, and shaped her course to meet the contingency.

This case was a disastrous one to the *Santa Claus*, both in injuries to the boat, and more especially in the destruction of the life of a person on board; and from the nature of her employment, as well as the character of her officers and crew, no imputation can justly be made of want of skill for her management, or of an anxious desire to employ it, so as to protect herself and other vessels she might encounter.

But on the evidence I am constrained to say, that on the occasion in question she was, through mistake and want of proper precaution, put off the proper course, so as to bring her into collision with the libellants' vessel, and cause an injury to the latter, which the owners of the *Santa Claus* are bound to indemnify.

I shall accordingly decree that the libellants recover their damages occasioned by the collision, and that the *Santa Claus* be condemned in the amount.

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It must be referred to a commissioner, upon the proofs in Court and other pertinent evidence, to inquire into, ascertain and report these damages to this Court.*

THE STEAMBOAT NEW-JERSEY.

In the valuation of damages caused by a collision, the owner of the injured vessel is entitled to be recompensed to the amount of his entire loss.

When the value of the vessel injured is only impaired, the measure of damages will be the sum required to reinstate her to the condition she was in at the time of collision; if she is a total loss, her market price or value at the time will be the criterion.

The colliding vessel cannot diminish the allowance of her market value by proving her actual worth to be less, because of her age, imperfect build or the state of her timbers.

A common carrier by water is not liable for the loss of cargo by collision at sea; but if a commissioner reports damages for that cause, an exception will not lie to the report to try the legality of the decision, it being a question on the merits.

Relief must be had by motion to vacate the report as not within the scope of the order of reference, or for a rehearing before the Court on the merits.

When seven exceptions are filed to a commissioner's report, and six are sustained by the Court, costs will be allowed therefor, to be deducted from the amount decreed to the libellant.

A DECREE having been rendered in this cause that the libellant recover against the steamboat New-Jersey

* The above case was removed by appeal to the Circuit Court, where "the answer was amended, and a large amount of additional evidence was taken which varied the case altogether from that presented below;" and in October Term, 1848, the decision of the District Court was reversed. (1 *Blatly*, C. C. R. 870.)

No opinion at large was given by the Circuit Court, and the decision of the Court below is therefore reported.—*Rep.*

the damages sustained by the sloop Hamlet, and the cargo on board, it was referred to a commissioner of the Court to ascertain and compute the amount of such damages; and having heard the evidence submitted and the arguments of counsel, he reported that he found the sloop at the time of the collision was worth three thousand dollars, and the cargo was worth five hundred and twenty-eight dollars.

Upon the coming in of the report exceptions were filed to it by the claimants, on the following grounds:

1st. That the value of the sloop reported by the commissioner was above her real worth.

2d. That the commissioner had given undue weight to the opinions of witnesses as to such value, and had not determined it by the facts.

3d, 4th and 5th. That in appraising her value he had not made proper deductions, because of her age, unsoundness and other defects.

6th. The commissioner has allowed a greater amount than it would have cost to have raised the sloop, put her on the ways and repaired her.

7th. That the commissioner allowed the owner of the vessel \$528 35 for the cargo on board, which did not belong to him; that the sum, also, was more than its value; that the amount of freight should have been deducted from the value of the cargo.

These exceptions were argued by

C. Van Santvord, for the claimants.

E. Burr & E. O. Benedict, for the libellant.

BETTS, J.—Twenty witnesses were examined before

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the commissioner in relation to the value of the *Hamlet*, and their testimony has been reported in full to the Court.

On examining it carefully, I am satisfied the commissioner has not over estimated the value of the vessel at the time of the collision. The owner is entitled to have the vessel estimated at its market value at the time of her destruction. His loss is the price it would produce on sale. The claimants cannot overcome that evidence by proving the vessel worth, intrinsically, less money, because of her insufficient build, her old age, or the actual state of her timbers. These considerations are of weight on an appraisalment of a vessel, but they afford no certain criterion of her market price. The evidence of the claimants does not show she was apparently below the value of craft of her class and age.

There is no right of abandonment to the owner of a colliding vessel because of any injury, less than a total loss by collision. The damages arising from collisions are compensated at the amount of actual loss sustained by the injured vessel. (*The Amiable Nancy*, 3 *Wheat.* 546.)

Accordingly, if the injured vessel is left in existence, and in possession of her owner, he must prove the amount of his loss over and above what remains to him. He is to be indemnified the expense of replacing her in the condition she was when the injury was received. (*Abbott*, 300.) The collision, in this case, occurred in October, 1845.

The sloop lay under water at the place until June, 1846, when she was raised, at an expense of \$500 to the owner, and could have been placed on the ways ready for repairs for \$25 more.

The cost of repairing her was then carefully estimated, and it is proved she could then have been repaired and placed in as good a condition as at the time of the collision, including new sails, for a sum not exceeding \$1,350. To this would be added the expense of raising her, and placing her on the ways ready for repairs, \$525, the whole being \$1,875.

Nothing was, however, done with her, and she was suffered to remain under water until September, when other ship-wrights, who examined her, proved her hull was not worth repairing; one valued it at \$250, and two testified that it would not pay the cost of breaking up for fire-wood.

The first survey and examination of the sloop was careful and thorough, and affords more satisfactory evidence of her true condition than the opinions of those who subsequently looked at her cursorily only, and after she had been three months under water.

The libellant does not prove that he tendered the wreck to the steamboat, or demanded the means of repairing her, and accordingly it must be assumed that his claim of damages had relation to her condition at the time. The damages, then, which he can rightfully recover, must be limited to what would have restored her to the condition she was in when injured, adding a proper allowance for loss of her services during the time reasonably required for her reparation.

No evidence was taken by the commissioner showing how long a time would have been necessary to repair her after she was raised, nor what would be a fair compensation for that loss of time. The allowance for loss of the services of the vessel should not commence prior to the efforts put on foot to raise her. No proof is

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given showing that the work could not have been done as well in November as May and June, and the owner ought not, therefore, to be allowed against the steamboat any time he voluntarily lost in regaining his vessel.

As the testimony stands, therefore, I am of opinion that the libellant is only entitled to recover \$1,875 for the injury to the *Hamlet*. He may, however, upon proper application, obtain leave to go again before the commissioner to establish more distinctly this class of claims. I accordingly so far allow the six first exceptions to the commissioner's report as to deduct \$925 from the value of the vessel reported, and order that the libellant recover therefor \$1,875.

The seventh exception is to the allowance of \$528 25 for the cargo on board; and the material question under that exception relates to the competency of the owner of the vessel to sue in his own name for that loss.

The owner of a vessel is not liable for the loss of goods shipped on board his vessel occasioned by a collision at sea, where no blame is imputable to him, (*Story on Bail.* § 512; *Ibid.* §§ 514, 518, and cases there collected,) and when by the bill of lading the perils of the sea are excepted. (*Abbott*, 472, 473.) It is held that such exemption is implied in all cases of carriage by water. (*Gould, J.*, 1 *Conn. R.* 487, and 12 *Conn. R.* 410; 1 *Nott & McCord*, 170.) And it would seem that usages of the particular place or business is made of important weight in determining the liability of *water* carriers. (3 *Kent*, 217.) Without proof, then, that the libellant had paid for the cargo, or made himself liable for it, and thus become equitably assignee of the

owner's right, this objection ought probably to have prevailed if made on the hearing upon the merits. But it is too late to raise the question on exceptions to the report of a commissioner. The authority of that officer extended no further than to consider and decide points of fact and evidence, and an exception to his report does not bring in review issues upon the merits. The remedy of the claimants would be by motion to reject the report, as not within the provision of the order of reference, or to allow a re-hearing on the merits. This exception is accordingly overruled.

The claimants may be protected against the hazard of an after suit by the owner of the cargo, on application to the Court to stay this portion of the recovery in Court until the release of the claimants is filed by the owner of the cargo.

The libellant will recover \$2,403 35, with his costs to be taxed, deducting therefrom the taxed costs of the claimants upon the six first exceptions to the commissioner's report, which are decided in his favor.

The Bag O'Beans.

THE BAG O'BEANS.

In a suit upon shipping articles by a seaman to recover wages for a voyage, if the articles are not produced by the master or owner at the trial, after due requirement by the seaman, his statement of the contents thereof, when disputed, will be prima facie evidence of the same.

But a call for the articles at the time of trial is not a sufficient requirement, unless it be made to appear they are then in possession of the Court, or directly within the control of the master or owner.

Quere. If the statement of the mariner is proof of any more than the master is bound by § 1 of the Act of July 20, 1790, to insert in the articles to wit: "a declaration of the voyage, or voyages, term or terms of time, for which the seaman or mariner shall be shipped?"

If a seaman ships under articles at Boston, in December, 1842, and at New-Orleans in March, 1843, and leaves the ship at Bordeaux, in June, 1843, and in his libel filed against the vessel in this Court for wages on these voyages, he prays "the shipping articles may be produced by the master or owner," that is not such notice or requirement as will render his statement proof of their contents.

When a witness is examined *de bene esse* out of Court in an Admiralty cause, by the claimants, and is cross-examined by the libellant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness, because interested in the cause, and concludes his testimony given is chief for the claimants.

The claimants, on proving a reasonable excuse for not producing the shipping articles on trial, may contradict by parol evidence the statement of their contents by the mariner.

The statement of the seaman is incompetent evidence to prove services rendered by him on board the vessel under the shipping articles.

Quere. Whether the act of July 20, 1840, § 1, art. 2, does not modify § 6 of the act of July 20, 1790, in respect to the duty of the master or owner to produce shipping articles, by causing them now to be deposited in the Custom-house at the port where the shipment takes place?

A seaman, who alleges in his libel for wages that he executed shipping articles for the voyage, cannot claim the right to leave the vessel at his option, and that the agreement is void under the act of 1840, because the shipping articles are not produced on the trial.

The sale by a part owner (who is also master) of his interest in a vessel before suit brought, and a release to him by his co-owners of all liability to them, because of any recovery of wages against them or their vessel, render him a competent witness in such action against the vessel.

The Brig Osceola.

On the 19th of March, 1846, William Frances, a colored seaman, filed a libel against the brig, in which he charges, that in the month of December, 1843, he shipped on board her at Boston, for a voyage thence to New-Orleans, thence to Bordeaux in France, and thence back to the United States, Morgan being her master.

That he shipped as cook and steward, at \$16 per month. That he signed shipping articles, containing his contract for the voyage, and prays that the articles be produced in Court. That on the 20th of December, 1843, the libellant entered on board the vessel and into her service, and that the vessel sailed with a cargo from Boston to Demarara, and thence to New-Orleans, where she arrived safely and delivered the cargo, and that the libellant continued on board in service of the vessel until April 10, 1844, when he was taken out of her and confined in prison at New-Orleans for one month, when he was returned again on board; and then, at the request of the master, signed articles "for the balance of the voyage, at \$18 per month." That the vessel, on the first of May thereafter, sailed from New-Orleans for Bordeaux, and arrived at that port with the libellant on board, July 20, 1844, where the master illegally discharged him from the vessel without paying the wages due him. He further alleges that the master detained his clothes in the ship, worth \$80, and refused to deliver them up to him, and he was out of employment at Bordeaux, until September 1, 1844, and was in the service of the vessel eight months and ten days. The libel charges obscurely that the master agreed when he shipped the libellant not to take him to New-Orleans. He claims for wages due, \$126 06, and \$80, the value

The Brig Osceola.

of his clothes. The libel prays an answer, but does not demand it under oath.

The answer was filed May 23, 1846, in the name of the owners of the brig, by their agent or attorney in fact.

It alleges that Bennett Morgan was master of the brig, and on the 18th of December, 1842, (and not 1843,) the libellant shipped on her as cook at \$14 per month, from Boston to Demarara, and one or more ports in the West Indies, and back to a port of discharge in the United States, and admits he signed shipping articles for the voyage, which they are ready to produce as they may be required. They aver that he received one month's wages in advance; that the vessel sailed from Boston December 31, 1842, to Demarara and delivered her cargo; thence to St. Thomas, in ballast, and thence to New-Orleans, in ballast, where she arrived March 10, 1843, and where the voyage ended. That the libellant was put in prison there, without the authority or consent of the master, and was paid his wages in full about the 14th of March, and gave a receipt in writing therefor; and about the same day he shipped as cook, and signed articles at the wages of \$18 per month, for a new voyage to Bilboa, thence to one or more ports in Europe, and back to a port of discharge in the United States.

That the vessel arrived at Bilboa and delivered her cargo, where \$14 80 was paid the libellant, and she proceeded with him to Bordeaux, where she arrived June 5, 1843. On the 27th of the same month, as the brig was getting under way on her return voyage, the libellant deserted from her and took all his clothes ashore, and did not leave her with the assent or knowledge of

The Brig Osceola.

the master or other officers of the brig, nor did he leave any clothes or property of his own with the brig. The answer denies that the master agreed to discharge the libellant if the vessel was about to proceed to New-Orleans, or that any balance of wages was due him.

The libellant called upon the claimants to produce the shipping articles at the trial, and rested his case without offering any evidence of a previous service of notice on the master or vessel to produce the articles on the trial. He afterwards read the cross-examination of the master of the brig, whose testimony had been taken on the part of the claimants; and when the libellant offered to put in evidence the direct examination of the witness in the deposition, the libellant objected to the testimony, as inadmissible, alleging that the master was part owner of the vessel.

The whole deposition was admitted by the Court. It was taken before a commissioner under the provisions of the act of Congress, on the 6th of April, 1846. The witness testified that he was part owner of the vessel when the libellant shipped on board, but had sold and conveyed his interest to the claimants before this suit was commenced. He also produced a release to him from the claimants of all liabilities to them on account of any recovery which should be had in this action by the libellant.

The evidence of the master supported the averments of the answer. He also stated, on his examination, that he had neither set of shipping articles in his possession. He supposed the original one was in the Custom-house at Boston, but did not know where the certified copies were.

The Brig *Ooseola*.

He testified that when the vessel arrived in New-Orleans, March 9, 1843, and he found he must give bonds in \$500 not to leave the libellant there, and that the libellant must also be put in prison until the departure of the vessel, he gave him the choice of being then discharged and shipping in another vessel, for a northern port, or to remain in prison until the brig was ready to sail. The libellant elected to be discharged, and that the witness then paid his wages in full, and took his receipt therefor. All the jail fees were also paid by the consignee of the vessel. That two or three days after, the libellant shipped on the voyage as stated in the answer, to Bilboa, &c., at \$18 per month. That one month's wages were paid him in advance, and all the residue were paid at Bordeaux; and that at the last place the libellant ran away from, and deserted the vessel, as she was leaving the port for New-Orleans; and that the vessel was detained twenty-four hours in Bordeaux in consequence, and that nothing was due him from the vessel. He had never promised the libellant not to return with him to New-Orleans.

The case was submitted to the Court by

A. Nash, for libellant.

E. Burr and E. C. Benedict, for claimants.

BERRS, J.—The libellant, in the first instance, introduced no testimony on the hearing, but relied upon his own statement of his case in the libel, accompanied with a verbal call upon the claimants in Court to produce the shipping articles. The deposition of the

master of the vessel had been taken *de bene esse*, on the part of the claimants, pursuant to the thirtieth section of the judiciary act of September 24, 1789, and he had been cross-examined on the part of the libellant.

The advocates of the libellant claimed the right to read that cross-examination from the deposition on file in Court, and excepted to the admissibility of the direct examination of the witness, because he was part owner of the brig, and interested in the case; and also, because the shipping contract being in writing, parol evidence of its contents could not be given by the claimants.

To obviate any objection to the witness because of his interest in the case, a formal release, executed and delivered to him by the claimants in Court, was given in evidence, which discharged him from all liabilities to them because of any recovery that may be had against them in favor of the libellant for wages earned on the voyages in question, or for any property belonging to him left on board the brig; and they also relied upon his testimony in the deposition that he had sold and conveyed, before this action was brought, all his interest in the brig, to the claimants. The exceptions are insufficient to exclude the evidence on either ground.

The libellant cannot select a portion of the testimony of the master and make it evidence for himself, and then exclude the residue which is favorable to the claimants, because of the legal incompetency of the master to be a witness in the cause. A party who calls a witness to testify to the merits of a cause renders him a competent witness for the opposite party; and his

entire testimony is thus necessarily made admissible against the libellant, and his general credit is also conceded.

But if the exception of the libellant prevails, and the evidence of the master is excluded, it may well be doubted whether he has furnished sufficient proof in the cause to support his action. None other would remain than his statement in the libel of the contents of the shipping articles. The evidence implied from such statement could be carried no further than to prove the shipping contract contained those stipulations which are prescribed as part of it by act of Congress. The provision of the statute is, - It shall be incumbent on the master to produce the contract, if required, to ascertain any matters in dispute, otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master." (*Act July 20, 1790, § 6.*) By the first section of that act the master of any vessel of fifty tons or upwards, bound from a port in the United States to any foreign port, is required, before he proceed on such voyage, to make an agreement in writing or in print, with every seaman on board, "Declaring the voyage or voyages, term or terms of time for which such seaman shall be shipped."

The matters in dispute contemplated by the statute manifestly are those resting upon the stipulations in the shipping articles, and upon all sound principles of interpretation would be restricted to those which Congress designated as vital to the contract. The penalty or disadvantage incurred by neglecting to fulfil the directions of the law is, that the master or owner will be bound by the statements of the mariner in respect to

those provisions, and be further liable to the highest rate of wages paid within the last three months at that port. Whatever the seaman chooses to assert, the agreement "Declared the voyage and term or terms of time of shipment to be," if disputed, must be deemed to be as he states it. Between the two versions of the *agreement* alleged in these pleadings, that stated in the libel must, to that extent, be adopted and executed as the true one; but I find no intimation in any authority that a seaman acquires the right under that provision to set up a contract for himself relating to any matter not specified in the act as a particular which must appear in the written or printed agreement. How far, then, the omission in the act of *wages*, as one of the constituents of the contract to be declared in the shipping articles, will permit the *statement* of the libellant to be made evidence of that particular, may be regarded questionable. If, however, under that privilege a seaman has the power to embrace every species of obligation the master is capable of entering into, he could not have one which would supply the further ingredient essential to the maintenance of his action—that is, that he had performed the voyage agreed upon. This fact can come into existence only after the execution of the shipping articles, and is incapable of being proved by their contents any more than that of short allowance, injurious treatment or abandonment of the libellant during the voyage. With whatever fulness the execution of the articles themselves might then be proved in Court, no decree could be obtained on that foundation alone. There must be the additional evidence that the stipulated services were performed. The averment or statement of that fact by the seaman

The Brig Onecoia.

could avail no more in establishing it than its denial by the owner or master in an answer would in disproving it. The bargain of hiring, however explicit, affords no ground of action without the agreed services have been performed or legally excused; and accordingly, if the statement of the libellant proves in this case the agreement he sets up in his favor, he does not thereby also prove he has rendered services on the vessel, or offered to do so on his part.

In my opinion, then, the libellant cannot derive from the effect given by statute to his declarations or statement, sufficient evidence to make out a right to wages.

If he might, in this instance, find in the answer admissions which, in conjunction with his statements, establish a *prima facie* right of action, his counsel does not avail himself of that evidence, but asserts a right to a decree in his favor solely upon the ground of his own allegations and the failure of the claimants to produce the shipping articles. In my judgment this evidence is inadequate.

There may be causes for question, whether the statute is intended to render the statement of a seaman proof of his contract on trial in Court, or the privilege be not limited to disputes upon points arising before a judge or magistrate on a preliminary application for a summons to the master or owner to show cause why process *in rem* should not issue against a vessel for wages. Giving the statute the construction most favorable to seamen, there must, no doubt, appear probable evidence that the shipping articles are in possession of the master or owner, or in a situation to be at their command, to be produced by them in Court on trial, before the mariner can substitute his statement for the contract,

The Brig *Ossola*.

which by the rules of the common law he would be compelled to produce and prove on his part.

The point is open for consideration, whether the act of July 20, 1840, § 1, art. 2, which by necessary implication compels the owner to deposit the original articles with the collector of the port where the contract is made, does not modify the 6th section of the act of July 20, 1790, in respect to the production of shipping articles in Court, if not so far as to relieve the master or owner from producing them at the call of the seaman, because now in the custom-house and as much at the command of the mariner as of the owner or master, yet at least to compel the seaman to give distinct notice, a reasonable period of time previously, that he requires their production at a specified time and place, to be used on the trial.

These shipping articles were executed, one at Boston, in December, 1842, and the other at New-Orleans, in March, 1843. This action was commenced in this Court, without summons, in March, 1846, and the claim and answer was filed by the claimants the May thereafter. No definite notice was given the claimants to produce either set of articles on the trial, previous to the time the cause was put on actual hearing.

The issue was made on the pleadings the 30th of May, and the cause was heard the 16th of June. The brig being a foreign vessel, and the libellant, in both instances, having executed the articles in question out of the State of New-York three years previous to bringing his suit, I think it exceedingly questionable whether he can act upon his statement of their contents in the libel, without proof that the articles were at the time in Court, or at least that he had given

The Brig Osceola.

notice to the claimants in reasonable time that he should require their production there on the trial. This may become a very important question in the construction of the two acts together, and as the necessities of the case do not demand an explicit decision upon it, I shall leave the point open for consideration until the case shall arise which renders its determination indispensable, remarking only that the libellant has no right of standing in Court other than on this technical point, that his own statement constitutes, *prima facie*, a full right of action and recovery in his favor. The claimants prove satisfactorily that the libellant had been paid wages due him to the time he left the vessel at Bordeaux, with the exception of three or four dollars. That he wilfully deserted her at that port, and caused thereby an expense to the vessel in waiting for and obtaining a substitute cook to fill his place, exceeding the balance unpaid him.

The counsel of the libellant takes two positions, which he insists obviates the charge of his desertion: first, that he could lawfully abandon the vessel at any time on the voyage, because the claimants do not give legal proof that he had bound himself to the brig by shipping articles executed as required by law; and in the second place, because the log-book is not produced and proof furnished by that, according to the provisions of the 5th section of the act of July 20, 1790, that the libellant was absent from the ship without leave of the officers in command of her.

There is clearly no foundation for the first point. The 10th article of section 1 of the act of July 20, 1840, renders all shipments of seamen made contrary to the acts of Congress void, but that, or any other

statute, does not annul the obligation of seamen to the vessel, and permit them to leave the service at their option, when the shipping articles are merely not forthcoming by the master to verify his authority over the crew. The obligation of the mariner is complete on the due execution of shipping articles, and is not revoked by its subsequent loss or destruction. If once duly executed it retains its binding effect upon all parties, if a reasonable excuse for not producing them in evidence be furnished.

The libellant avers in his libel that he signed shipping articles, and claims wages under that contract from Boston to New-Orleans and from New-Orleans to Bordeaux, and thence back to a port of discharge in the United States. He thus precludes himself from asserting that his shipment was void. In the second place, it being proved that the libellant wilfully and clandestinely absconded from the brig with the intention not to return to her again, he forfeits his wages under the general marine laws. (3 *Kent*, 198.) And the offence may be established according to those laws without resort to the methods of proof designated by the 5th section of the act of July 20, 1790. (1 *Sumner*, 373; 1 *Hagg*. 163; *Ware*, 437.) The statutory evidence is necessary to convict a seaman of a desertion, which carries a forfeiture of wages, when not shown to be wilful and with intention not to return to the vessel. The desertion punished as an offence by the maritime law is defined in the same terms and established by the same process as it was prior to the act of July 20, 1790. So, also, without invoking the law specially applicable to seamen, the libellant, under the common law contract of hiring, could not maintain an action for compensation

The Schooner John Wurta.

for serving a portion of the time bargained for. When the engagement is for an entire period or undertaking, it must be fully performed, or all claim to compensation under it is lost.

In either alternative, whether the libellant claims a right to recover on the effect given to his statements by the statute, or succeeds in excluding the testimony of the master, he will stand before the Court without evidence entitling him to a decree.

But I think, independent of the act of the libellant in reading part of the deposition of the master in support of his demand, and thus bringing the whole deposition into the case as evidence, that the proofs satisfactorily show the master was no way disqualified as a witness, having no interest in the vessel or in the event of the cause.

The libel must accordingly be dismissed, with costs.

THE SCHOONER JOHN WURTA.

An indispensable ingredient of a salvage claim is that the service has contributed immediately to the rescue or preservation of property in peril at sea. How far a person must be directly employed aiding the recovery of a wreck to constitute him a salvor? *quære*.

But the title of salvor arises from actual possession of property in peril, with power to save it, and the actual employment of means to that end.

The rate of compensation is governed by no determinate rules of law. The principle sought to be enforced is to make a fair division of the saved property between its owners and the salvors.

In case of absolute derelict, the habit of maritime Courts favors an equal partition of what is saved, one moiety to the salvor, the other to the owner, after deducting the costs of suit.

The Schooner John Wurts.

THIS was a cause of salvage. The action was brought in the name and favor of James Curtis, master of schooner Elizabeth, for himself, the owners and crew thereof, and also for the respective owners, masters and crews of the schooners David Cromwell and The Vineyard, and the sloop Hickory, and all others entitled. The libellant Curtis alleges that he was master and part owner of the schooner Elizabeth, of 65 tons burden, having a crew of three men and a boy; that she was employed in the coasting trade to and from New-York; that the schooner David Cromwell was a vessel of 30 tons burden, with a crew of two men, and the schooner Vineyard was of 45 tons burden, with a crew of two men, all three registered at Amboy, New-Jersey; that the sloop Hickory, a small fishing vessel, with a crew composed of her master and one boy, on or about the 9th of November last, discovered a large schooner, the John Wurts, floating on the lower or Sandy Hook Bay, bottom up, dismantled and filled with water and deserted; that the sloop not being able to tow the wreck, came to where the above-named schooners were lying, and it was agreed that they and the crew of the sloop should proceed to the wreck and tow her into port. He further alleges that various articles necessary to this purpose were immediately procured at considerable expense. He further alleges that the captains and crews of the vessels applied themselves from the afternoon of Monday until Wednesday morning upon said wreck, and for some days more, when finding it impossible, on account of the bad weather, to get said wreck into port, they employed the steamboat Telegraph to assist them; that after working all one day they succeeded in bringing the wreck to

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the shore at Staten Island. He further alleges that the vessel was wrecked about the 10th of September in a storm, when all hands on board perished; that she had from that time until the 9th of November, been drifting about at the mercy of the winds, and would soon have been broken and gone to pieces. He further alleges that it was with the greatest difficulty and exposure that the wreck was finally saved by libellant.

Thomas Bell, Joshua and Charles Jones, owners of the schooner *Excelsior*, also intervened and alleged that they were entitled to salvage in said wreck, alleging that having been informed of the wreck of the *John Wurts* by the wreckmaster, they proceeded about the 10th of November, and found her sunk in about ten fathom water, bottom upwards; that after attempting to raise her, they were obliged to leave on account of the very bad weather; that afterwards the steamer *Jacob Bell*, in the employment of the agent of the owners, came and assisted in towing her; that they towed her about ten miles towards Sandy Hook; that afterwards they were informed by the owners that the owners would employ one of their own vessels to save her. They further allege that the owners being unable to save her, agreed with libellants that they would allow the one-half of the proceeds of the said *John Wurts* and cargo, if they would renew their efforts and bring her into port. They further allege that, in pursuance of this arrangement, they prepared themselves with a heavy chain and a large wheel cast expressly for the occasion, and employed Captain Bennett, who was experienced and skilful in raising vessels, to go with them to the wreck; that they visited the wreck, but were prevented by the weather from continuing

The Schooner John Wurts.

their work. That another trip was made by the Excelsior and the schooner Union and her crew, employed by libellants, and again without success, owing to adverse winds, which increasing to a gale, drove them away, and in which the bows of the John Wurts, striking violently against the bottom, she was opened, and her cargo chiefly or wholly discharged, and she was blown off to sea. They further allege that for three or four weeks they were in active pursuit of her, but could not find her, until they saw her in New-York Bay, in the possession of the libellant, to whom they gave notice of their claim for salvage.

Jesse Richards, intervening as owner, admits in his answer the wreck of the John Wurts, as alleged, and that she was found by libellants about the 9th of November, but he is informed that she was found within the bar at Sandy Hook, and there was but little difficulty and no danger in towing her to the shore at Staten Island. He admits that she was found dismantled, bottom up and totally deserted.

In answer to the claim of Joshua T. Jones, owner of the schooner Excelsior, he denies that he is entitled to salvage; that his agents entered into the following agreement with the said Jones for his services: "It is hereby agreed between Joshua T. Jones, and Warrington & Richards, that the said Jones will take the schooner John Wurts, and what cargo is on board of her, at a salvage of fifty per cent., (and to deliver her in the vicinity of Jersey City,) for saving the same, and all that has been saved by the schooner Excelsior at the same rate; and Warrington & Richards shall not be at any charge for what Captain Bell has done with the schooner Excelsior previous

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to this contract for the schooner nor for any materials."

"WARRINGTON & RICHARDS,
"JOSHUA T. JONES."

The claimant alleges, that though frequently urged to go on with their work, and bring in the schooner, that they delayed it for other employment, for several weeks, being engaged in raising other vessels. He denies that they are entitled as co-salvors to compensation as claimed.

The original libel in this case was filed by James Curtis, for himself and others, to recover salvage compensation for saving the schooner John Wurts, and contains appropriate allegations to that end, and is substantially supported by the evidence.

After the action was instituted, Joshua T. Jones and others, owners of the schooner Excelsior, by leave of the Court, intervened in the suit and claimed a share of such salvage as should be awarded by the Court for saving the schooner.

The material facts in proof are these: The John Wurts, owned by the claimant, in New-Jersey, was wrecked in a gale on the 8th or 9th of September, a few miles below Sandy Hook, on a voyage from the North River and New-York to her home port, and all on board perished. The claimant was also owner of most of the cargo, and shortly after her loss employed the schooner Excelsior and other vessels, with a steamboat, to endeavor to save the wreck and cargo. They succeeded in raising her and towed her several miles, when she escaped from them and again sunk in ten fathoms water, her bows in the sand and her stern just

The Schooner John Wurtz

out of water. All the expenses of these proceedings were paid by the claimant, except those of the schooner *Excelsior*.

On the 26th of September an agreement in writing was entered into between the claimant and Joshua T. Jones, managing owner of the *Excelsior*, that he would undertake the salvage of the vessel and cargo, and deliver them near Jersey City, for fifty per cent. on the amount saved, and that allowance should also be in full compensation of services already rendered by his vessel and crew under the employment of the claimant.

About the 6th or 7th of October the *Excelsior* proceeded to the wreck, with apparatus prepared to raise it, and passed a large chain under its stern, but she had not force enough to move it; the chain was secured around the wreck and the *Excelsior* and her crew went back to the city for further assistance. They had been engaged about twelve hours in this service. On the 13th of October the *Excelsior* and another vessel started to go to the wreck again, but were driven off by a heavy gale of wind. The schooner is supposed to have been moved by the same gale, as a day or two after she was seen drifting to the eastward, past Fire Island, and was subsequently reported off the east end of Long Island.

After a heavy blow from the eastward she was again seen drifting to the westward, past Fire Island, towards the New-Jersey shore. When information was received of this last movement of the wreck, the *Excelsior* was sent to Fire Island to search for it, but could discover nothing of it. The *Excelsior* was then engaged by her owners in another wrecking adventure near Fire Island. The *Excelsior* was after that further dispatched

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to New-York Bay in search of the schooner, but without success.

The agent of the claimant, after the agreement of September 24th, repeatedly urged Jones to pursue with promptitude the undertaking to raise the wreck. Jones, at the time of the agreement, declared he should be able to complete the salvage in two days, and ten days or more after this agreement he excused himself when pressed on the subject—the weather being particularly fine and favorable—by saying he was engaged in other business, or had arrangements to make before going to the wreck.

On the 9th of November, the libellants, Curtis and others, fell in with the schooner, grounded on the Great Kill shoals in Sandy Hook Bay, bottom upwards, filled with water, her bows bilged, her rigging and masts all gone, the principal part of her cargo out, and her bulwarks and stancheons mostly carried away.

Immediate and active exertions were applied to saving her; and by aid of several small vessels, with chains and other appropriate apparatus, and a steamboat to tow her, she was got off the shore and moved towards Amboy, but grounded several times before she could be got to Staten Island.

A good deal of difficulty and some danger was incurred in keeping her afloat. The weather was thick, cold and severe, and nearly a fortnight was occupied constantly by all the libellants and their vessels before the salvage was accomplished—at times the crews being kept at work all night. They were compelled to float her bottom upwards and stern foremost, at great disadvantage and risk, and to the hazard of her turning over on the small vessels supporting her and

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crushing them. The ordinary incidents of breaking chains in securing and saving her, and injuries to the vessels employed, were experienced.

The wreck sold for about \$1,300, and the fragments of her cargo remaining with her for about \$50.

The case was argued by *J. O. Hart*, for the libellants, Curtis and others.

Burr & Benedict, for Jones and his associates.

J. M. Mason, for the claimants.

BETTS, J.—Upon the facts in this case the claim of Jones and owners of the *Excelsior* to salvage cannot be allowed. It lacks the indispensable ingredient of a salvage service: that of having contributed immediately to the preservation or rescue of the property in peril at sea.

The circumstances in proof do not demand of the Court a decision upon the point, how far a person must be directly employed aiding the recovery of a wreck to constitute him a salvor. Nor am I disposed to lay down the rule that he must make it certain the property was saved by his assistance; but I am not aware of any principle which invests him with the rights and privileges of a salvor, until it is rendered reasonably probable upon the evidence that his labor or skill have contributed towards protecting property exposed to instant peril at sea from ultimate loss or further damage.

An impression seems to have obtained, that one who finds derelict property under water or afloat, acquires a right to it by discovery, which can be maintained by

The Schooner John Wurtz.

a kind of continued claim, without keeping it in possession or applying constant exertions for its preservation and rescue.

There is no foundation for such notion.

The right of a salvor results from the fact that he has held in actual possession or has kept near what was lost or abandoned by the owner or placed in dangerous exposure to destruction, with the means at command to preserve and save it, and that he is actually employing those means to that end.

The finder thus becomes the legal possessor, and acquires a privilege against the property for his salvage services which takes precedence of all other title. (*Lewis v. The Elizabeth and Jane, Ware, 41; The Bee, Ware, 332; The St. Peter, Bee, 82.*)

The law will protect him against all interference by others, even the true owners, until he is adequately rewarded or opportunity is allowed to bring the property to a place of safety, and have his compensation secured him by the judgment of the proper tribunals.

The fact that property is found at sea or on the coast in peril, without the presence of any one to protect it, gives the finder a right to take it in his possession; and the law connects with such right the obligation to use the means he has at control, and with all reasonable promptitude, to save it for the owner.

He can therefore be no otherwise clothed with the character of salvor than whilst he is in the occupancy of the property, and employing the necessary means for saving it.

Notorious possession, with the avowal of the object of such possession, are cardinal requisites to the creation or maintenance of the privileges of a salvor; where

they do not exist, any other person may take the property with all the advantages of the first finder.

This is the clear policy of the law. It rewards with liberal generosity a meritorious salvor, but counts first in the order of his meritorious acts a prompt use of sufficient means, both in getting at property needing relief and abiding with it until its salvage is completed. The value of his services is enhanced and their compensation augmented proportionally to the danger and loss to the salvor accompanying such exertions and their benefit to the owner.

No one of these cardinal qualities appears in support of this claim. The most that is proved in favor of the owners of the *Excelsior* is, that being in port after having left the wreck, they directed apparatus to be prepared here to aid in raising it. A fortnight or three weeks were consumed awaiting such preparations, the wreck in the mean time being left deserted, with the exception that the *Excelsior* and crew were once alongside of it for about twelve hours.

Under those circumstances, any other persons going to the wreck and effecting its saving would have been entitled to the rights of sole salvors.

The claim becomes infinitely weaker, when set up after the wreck had been forced from the place where it grounded, and was driven by the winds and waves for nearly a month to and fro out at sea, and along the coasts. I accordingly pronounce against the claim of the owners of the *Excelsior*, and only refrain imposing costs on them because of the loss and expense incurred by them in making their preparations and efforts, amounting to \$120 or \$130, independent of the time employed by the *Excelsior* and her crew in their fruitless efforts.

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If they have any right to compensation for services rendered prior to the written agreement, it cannot be enforced in this action. They must look to the owner personally on his contract with them.

The right of the other libellants to a reasonable reward is not denied by the owner; but he seeks by his defence to prove that one or two hundred dollars would be a full compensation for the time occupied and assistance given by the libellants on the occasion.

It is unnecessary to repeat the principles entering into the determination of a salvage reward; they have been too often discussed and stated in the decisions of maritime Courts to leave any important illustration of the doctrines unexplained.

There can be no doubt of the rightful authority of the Court to regulate the award of compensation very much at discretion; but all judicial tribunals find fixed rules of adjudication, when at all applicable to the subject, more useful and satisfactory in operation than mere discretionary allowances, however discreetly they may be allotted. (*Tyson vs. Prior*, 1 *Gallison*, 133.)

Accordingly, maritime Courts, when not governed by positive law in this respect, have, by a kind of common concurrence, favored an allowance, if in cases of derelict, of from one-third to three-quarters of the salvaged property to the salvors, varying the amount between these points by regard to the special nature of the services, the peril and toil incurred and value of property saved, and hazard to property employed in making the salvage. (*The Jubilee*, 3 *Hagg*. 43 n.; *Abbott by Story*, ed. 1829, p. 398.) The growing preference, however, to determinate rules of compensation in salvage cases, has so far settled upon a moiety as the proper

rate of division in cases of absolute derelict, that it may almost be termed the habit of Courts to give that proportion when no imperative consideration induces them to deviate from it. (*The Ship Henry Erbank*, 1 *Sumner*, 400; *The Cora*, 2 *Peters Adm. Dec.* 361.) The extraordinary merit of the services may augment the share awarded, or the large value of the property saved diminish the allowance. No sagacity could hope to select a fixed amount, which would in every instance be an appropriate compensation. A moiety, however, approximates sufficiently near to accomplish most of the important benefits which salvage rewards were designed to subserve, comprehending the general interests of maritime commerce and a reasonable partition of the imperiled property between the owner and the party instrumental in recovering and restoring it. Courts accordingly are inclined to countenance that method of fixing the reward, unless special circumstances call for a discriminating valuation. (*The Waterloo*, *MSS.*;^{*} *The Galaxy*, *MSS.*† I think none such exists in this case, nor on a careful estimate of the services rendered, with a view to the small value of the property saved, and the probability that little or nothing could be realized from the adventure and the actual benefit to the owner, do I regard six or seven hundred dollars a disproportionate compensation to be specifically awarded the libellants for what was performed by them.

I therefore decree in their favor the costs of suit, first to be paid out of the proceeds in Court, and then, that they receive the moiety of the residue for the salvage services rendered in this case.

Unless the mode of distribution between the libellants

^{*} Since reported, 1 *Blatch. & How.* 114. † *Ibid.* 270.

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is adjusted amongst themselves, it must be referred to a commissioner to ascertain and report the proportion payable to each, and to each vessel employed in rendering the salvage service.

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A seaman cannot maintain an action *in rem* for wages on board a small sailing craft plying on the Hudson River between Troy, Bristol and the City of New-York, if at all, after a year from the sale of the vessel to a *bona fide* purchaser without notice of the outstanding wages, especially if the seaman was present and knowing of the sale.

A tacit lien is lost, or will be deemed waived by unreasonable delay in enforcing it. It will not be upheld in prejudice of an innocent purchaser in favor of a party who seeks to enforce it inequitably.

In many systems of jurisprudence secret liens are limited by positive law. They are rejected as stale in all others, when unreasonably delayed or concealed against good conscience and fair dealing.

When a seaman is hired to serve on a small vessel navigating the interior waters of the State, and he knows the residence and responsibility of the owner, he will be required to seek his remedy for wages in the Municipal Courts of the vicinage, at the risk of all costs if he arrests the vessel in this Court.

This Court may refuse to take cognizance of such case unless it be shown that the remedy in the local Court is doubtful.

AUGUSTUS JOSLINE, of Waterford, in this State, the libellant, alleges, that on or about the 1st of June, 1845, he shipped at Troy, on board the scow Bolivar, as a second hand, at the rate of sixteen dollars a month; that said vessel was owned by James Rynders, the master, and was employed in carrying freight upon the tide waters of the Hudson River, between Troy, Bristol and the City of New-York; that he was employed at that rate from the time he shipped until July,

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1845; that his wages amounted to \$32, of which he had been paid \$16, leaving a balance due him of \$16. He further alleges that said vessel was owned by James Rynders, the captain thereof, who had sold her to Isaac Swangler, of Philadelphia; that said Swangler knew that libellant was employed as a hand on said vessel; that immediately after the sale of said vessel, she was taken out of the jurisdiction of this Court, the libellant having been discharged from her.

He prayed that the owner of said vessel may be decreed to pay him his wages due as aforesaid.

George Donner, the owner of the scow, in answer to the above claim says, that he purchased the vessel from Isaac Swangler; that he knows nothing of the claim of the libellant, and he alleges that he is informed and believes that on or about the 29th of July, 1845, when said Swangler had purchased the scow from Rynders her master and owner, the said master stated in presence of the crew, the libellant being present, that that was the last trip they would make with her, as on her return said Swangler would take possession of her as owner; and that there was no lien or incumbrance of any kind upon her; that neither of said crew dissented from this representation of said Rynders, or made any claim for wages, or that any was due. He further alleges, that on the return of the scow from Troy to Bristol, the said Swangler, or his agent went on board of her for the purpose of taking possession of her; that he conversed with the crew and libellant, telling them of his object; that neither libellant or any of the crew made any demand or said any thing about wages, or intimated that any thing was due them from the vessel. He further alleges that said Rynders, at that time, and

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ever since, has been able to respond to any claim for wages due the libellant, and resides at Waterford, in the immediate vicinity of libellant. He further alleges that libellant has never made any claim of said Swangler or himself, previous to the filing of this libel, though said scow has been ever since running between Philadelphia and New-York, and that he purchased her without notice of any outstanding demand of libellant for wages against her, and believing her free of all liens for wages. Wherefore he prays that the libel be dismissed with costs.

It appeared in evidence that the libellant shipped and served, as alleged by him, on board of the scow; and further, that the vessel was sold by her master and owner, *bona fide*, for a full consideration, to Swangler, and by him to the present claimant; the sale took place in Bristol, Pennsylvania, with the knowledge of the libellant, who then made no claim for wages due him or gave any notice thereof, until more than a year after said sale. It also appeared in evidence that the libellant resided in the immediate neighborhood of Rynders, the former master and owner, and subsequently to the sale was employed in the same trade and between the same places as was this vessel for the residue of the season.

A. Benedict, for libellant.

R. Goodman, for claimant.

BERRIS, J.—The point contested in this case is whether the libellant can maintain an action *in rem* for wages, upon the pleadings and proofs presented in the

case. Under ordinary circumstances, a sale of a vessel will not divest the lien a mariner has against her for the security of his wages; and if the sale is by process of law, Admiralty will uphold and enforce the lien against the proceeds of the vessel, wherever they may be found and identified. (*Sheppard and others v. Naylor and others*, 5 *Peters*, 675.) But it is necessary that seamen, as well as others, in order to uphold a tacit lien or privilege, should not intentionally conceal it to the prejudice of purchasers acquiring the property *bona fide*, and in ignorance of the incumbrance.

Wise and equitable provisions are introduced into some systems of jurisprudence limiting their continuance to fixed periods of time. In France and in Louisiana, the privilege upon the ship for the wages of the crew must be claimed and asserted before the ship has made a voyage, (in case of a sale,) in the name and at the risk of the purchaser. If such voyage is made without any claim being interposed by the crew, or if more than sixty days have elapsed between the departure and return of the vessel, she having been sold, the privilege is lost. (*Code de Com.* 191; *Sirey*, tom. 25, part 1, p. 207; *Duranton des Privilèges*, liv. 3, tit. 18, §§ 2, 6, n. 133; *Civil Code of Louisiana*, arts. 3,204, 3,210; *Terry v. Terry*, 10 *Lou. R.* 75.) So in Pennsylvania, the time of delay within which a seaman must assert his lien is fixed by statute to nine months. (2 *Laws Penn.* 475.)

By the marine law there is no fixed period of time within which mariners must proceed to enforce their lien for wages, yet such lien will become extinct or barred by unreasonable delay, if the vessel passes into

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the hands of a *bona fide* purchaser, ignorant of such claim. (3 *Kent Com.* 196.) Judge Ware remarks, it is not doubted that a seaman may lose his lien by lying by for a length of time, and suffering the vessel to be sold to a person ignorant of his claim, without giving him notice. (*The Eastern Star*, Ware's R. 184.) And in *Leland v. The Ship Medora*, it was held that liens for wages should in no case extend beyond the next voyage, if they are unknown to the public, and new interests of third persons as to the vessel intervene without notice. (2 *Woodb. and Minot*, 104.) In the case of *Packard v. The Sloop Louisa*, Judge Woodbury animadverts strongly upon the equities of innocent parties in opposition to secret and stale liens. He says, to allow a seaman, after his voyage is over and his contract ended and his connection with the vessel dissolved and he has embarked for years in employment elsewhere, to retain a secret lien on the vessel, and thus prevent her sale or use unincumbered and embarrass any new purchaser without notice, would be very bad policy. (2 *W. & M.* 49.)

If the claimant in this case had either actual or constructive notice of the claim of the libellant, he might have protected himself against it by requiring the vendor to extinguish it, or he could have withheld the amount from the purchase money. The conduct of the libellant was calculated to mislead and wrong him. He was present at the negotiation of sale, and was informed, in presence of the purchaser, that it had been made, yet permitted him to buy, without giving him notice there were wages in arrear. These considerations supply an equitable bar to the action in this form, treating it as brought by a mariner for services on a sea-going vessel.

The case is, however, to be considered in another point of view. The bargain for labor on this small craft had relation to services on the waters of the Hudson River, within this State, and was between men who were near neighbors, residing in the interior of the State, the seaman well knowing the responsibility of the master and owner of the vessel, and, except only by intendment of law, hiring himself no doubt solely trusting to that personal responsibility. There was an easy and cheap remedy at his command in the local Courts against the owner for his wages, upon which he would naturally rely, and this Court discourages actions *in rem* upon demands of this character, by denying all costs in them where they could be enforced in the municipal Courts of the vicinage of the parties, and will even refuse to take cognizance of such demands *in rem*, unless it be proved that the remedy in the local Courts is doubtful.

For these reasons, the libel will be dismissed with costs.

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A mariner has a lien for wages earned on board a sailing vessel of fifty tons burthen, engaged in the transportation of merchandise on tide waters upon the Hudson River, within the territory of the State.

This lien can be enforced against the vessel in the hands of a *bona fide* purchaser of her, if she was sold without the knowledge of the seaman and he pursues his claim at the first opportunity after his debt has accrued.

Although the mariner and owner are residents of this State, near each other, and the amount in demand is small, the suit therefor need not be prosecuted in the local courts, if demand of payment is previously made of the owner, and the latter fails to prove the seaman had adequate remedy against his property in such courts.

THIS action was instituted by John W. Shook for the recovery of a balance alleged to be due him for wages earned as a hand upon the scow Bolivar, a small sailing vessel of fifty tons burthen and over. The pleadings and the evidence for the defence were mainly the same as in the case of *Augustus Josline v. The same vessel*. For the reasons set forth in the decision in that cause the libel was dismissed with costs.

Some days subsequent to the hearing, a motion was made on the part of the libellant for a re-hearing, and it appearing upon the allegations and affidavits produced on the part of the libellant, that there is reasonable ground to believe that his case was not fully and accurately presented to the Court on the former hearing, and that he was in possession of new and material testimony not known to him on the former hearing and not then at his command, it was ordered, on motion of his advocate, that a new hearing be granted therein, the libellant paying the costs of the former hearing and of this motion.

On the re-hearing, the libellant produced proofs showing that his hiring on the vessel terminated in this State on the 15th day of July, 1845, wages then being due him, and that she was, a few days thereafter, sold in the State of Pennsylvania, on the Delaware River, and was there delivered to the purchaser without the knowledge of the libellant.

It was further proved that the libellant demanded payment of his wages of the former master and owner without obtaining them, and refused to relinquish his lien on the vessel therefor; and the wages not being paid, he directly thereafter left his demand with the proctor in this cause, with directions to have the vessel arrested therefor whenever she could be found within the waters of this State; and that the libel in this case was filed, and the warrant thereon issued, and the said vessel arrested on her first return to this State. Upon these facts it was contended that the libellant was entitled to a decree for the balance of wages due him.

A. Benedict, for libellant.

R. Goodman, for claimant.

BETTS, J.—On the former hearing, this cause was dismissed for the reasons given in the preceding case of *Josline v. The same vessel*. The new evidence introduced on this hearing has freed the case of the objections upon which the former decree was based. It is not denied that a mariner has a legal right to proceed *in rem* for the recovery of wages against craft of this character, engaged in transporting merchandise on

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tide waters; and the evidence now shows that all proper efforts and diligence were used by the libellant to collect the debt of the owner before the vessel was attached in this Court, and that her sale was made without notice to the libellant.

There having been no laches on the part of the seaman in this case, the lien follows the vessel into the hands of the purchaser, and can be enforced notwithstanding his ignorance of its existence, wherever the vessel can be found. (*Shepard and others v. Taylor and others*, 5 *Peters*, 675; *The Neptune*, 1 *Hagg.* 227; *The Mary*, 1 *Paine*, 180; *The Batavia*, 2 *Dods.* 500; 2 *Sumn.* 443.)

This demand was put in train for collection against the vessel within a few weeks after it became payable, and its prosecution was delayed by the absence of the vessel from the State, out of the jurisdiction of the Court, and not by the laches of the libellant.

The libellant proves an unsuccessful demand of payment from the owner who contracted with him; and his inability to satisfy the wages may be reasonably implied, in the absence of all evidence on his part that he possessed property sufficient to satisfy the debt, and that it was so circumstanced that it could be reached by the process of the municipal Courts.

I think the libellant has supplied satisfactory reasons for the delay of his proceeding, and for resorting to this remedy in this Court against the vessel.

Let the following decree be entered in this cause:

It is ordered that there be a decree in favor of the libellant for the amount of wages due him, and that the vessel be condemned therefor, and for the taxed costs

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of this suit; and unless a stipulation by the parties, fixing the amount of such wages, is filed within two days after this decree, it is further ordered that it be referred to a commissioner to ascertain and report the wages due the libellant, after deducting all proper charges and allowances.

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In actions in the federal Courts, parties to the record cannot be examined as witnesses.

The federal Courts will, upon motion and for good cause shown, authorize the name of a party to be stricken from the pleadings; and he can then be examined as a witness, subject to all legal objections.

Sailing vessels meeting steamers at sea must use due precautions to avoid coming in collision with them, as for example by taking care not to impede their course or embarrass their navigation.

In an action for damages incurred to a sailing vessel through collision with a steamboat, the libellants must prove the sailing vessel clear of all culpable conduct conducing to the collision. Steamers are not bound to guard sailing vessels against their own misconduct.

It is the duty of a steamer to take prudential measures in ample season for avoiding a sailing vessel, when the two are approaching.

Sailing vessels are not bound to have lights suspended in the night time.

The positive testimony of witnesses to their own acts, at the time of a collision, is entitled to outweigh the opinions and belief of out-numbering witnesses who judged of such acts from the opposite vessel.

The master and crew of a vessel are competent witnesses for the owner of the vessel in a cause of collision.

THIS was a cause of collision. It came before the Court upon the following pleadings: The libel and complaint of Zebulon Paine, owner of one-half part of the schooner Iola and owner of part of her cargo; Sarah Sherwood, owner of the other half part of the

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schooner; John Buchanan and Andrew Bradford owners of part of the cargo: Joseph Sumner, master of the said schooner; James McCollin, mate; Ambrose Venelan, James Wooster, seamen: Henry Coff, cook: and Augustus Norton, a passenger on board of said schooner, allege that the said schooner Iola, on or about the 7th day of July, 1846, left the port of Eastport, in Maine, with a cargo of lathes, pickets, plaster, fish in barrels, and packages of money, bound for the port of New-York; that the schooner was tight and staunch and strong, and well manned and appointed; that in the evening of the 14th July she had proceeded about a mile to the south of the light-boat stationed off the Middle Ground, a shoal nearly opposite to Stratford Point, and that the schooner passed the light-boat, being about a mile to the southward thereof; that the said schooner was then steering about a west course, the wind being nearly from the north; that the night was clear, and the said vessel could be easily discerned at a considerable distance; that whilst sailing upon her course, about west, with a fresh wind, going from six to eight knots an hour, between nine and ten at night she was negligently run against and into by the steamboat Neptune, which was then proceeding down the Sound from the city of New-York, and run and struck against the hull of the said schooner between the fore and main rigging on her larboard side, with such great force and violence as to break and tear open the hull of said schooner, and cut her nearly in two, so that she filled and sunk almost immediately, and the said vessel and her cargo, and the clothes, money and effects of the crew and passengers, were totally lost, and a female named Murphy and her child, were drowned; that

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Long Island Sound, where the disaster occurred, is very wide, and there was ample room for the steamboat to have passed and avoided the schooner; that the schooner was worth three thousand dollars; that that part of the cargo belonging to the said Paine was of the value of \$550; that the value of the cargo belonging to John Buchanan was \$117; that the owners of the schooner lost the freight and passage money, &c., and the other libellants set forth their losses as by annexed schedules; they pray for a decree in their favor, for their damages and costs.

The respondent in his answer says, that as to the ownership of the schooner *Iola*, the cargo and the other subjects of property, he knows nothing, and therefore leaves it to the libellants to make out proof of their allegations. He further alleges that the steamboat *Neptune*, being in good order, sufficiently equipped and manned, sailed from New-York, 14th July, 1846, bound to Newport and Providence, in Rhode Island, and proceeding upon her passage at her regular rate, about one mile from Stratford light-boat, about nine or ten o'clock in the evening, a vessel was seen about one-half of a quarter of a mile ahead, which vessel was the schooner *Iola*. That immediately upon seeing the schooner, the course of the steamboat *Neptune* was changed to windward of the schooner, for the purpose of giving the said schooner the course she was then running. That when the said steamboat was about ten or twelve lengths from said schooner, it was observed that the latter had changed her course, and was luffing up so as to cross the bows of the said steamboat. That when first seen, said schooner was running north by south, from which she changed suddenly to about

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north-west. That on seeing that said schooner had changed her course, the bell of the steamboat was immediately rung to stop her, and all efforts made to avoid the collision: but the said schooner came directly across the bows of the said steamboat, and the latter having some headway, a collision could not be avoided. That said schooner was struck about midships, and her crew at once jumped from the rigging on board the said steamboat. That hearing that a female and child were left on the schooner, a small boat was immediately lowered from the Neptune, sufficiently manned, and every effort made to save any persons on board said schooner. That the captain of the steamboat, and the men with him who manned the said small boat, continued to row about the place of the disappearance of the schooner for more than half an hour, and finding no person needing their aid, they returned to the Neptune. That the master, pilot and wheelsman of the Neptune were experienced and skilful, and that the crew were not inexperienced, careless and incompetent men; nor was the steamboat carelessly, improperly or unskilfully navigated at the time; nor was the loss of the schooner and cargo, nor the lives of any persons, if any such were lost, occasioned by the fault, carelessness or unskilful management of the steamboat. That the reason why the said schooner was not seen earlier was that a heavy, black cloud shut her out from view, and she had no lights visible on board. That the change of the course of said steamboat threw the broadside of the Neptune to view from the schooner, so that the man at the helm on the schooner saw the head and stern lights of the steamboat, and her course was plainly seen by him. That the wind was blowing

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fresh, and the "luffing up" of the schooner so as to cross the bows of the steamboat, when the position and course of the latter was evident to those on board, could not have been expected by any person on board the steamboat, and was contrary to all proper and lawful rules of navigation. That the accident aforesaid was occasioned by the great negligence and want of care of the officers and crew of the schooner in not providing proper lights on deck, and in changing the course of the schooner right across the bows of the steamboat, and not by any negligence, want of skill or care of the officers and crew of the steamboat. Wherefore they pray that the libel be dismissed with costs.

The matters in controversy under the pleadings relate to damages sustained by the owners of the schooner *Iola*, who are a portion of the libellants, and also by the owners of the cargo and property on board, who are the other libellants, in consequence of her destruction by collision with the steamboat *Neptune*.

The master and crew of the *Iola* are co-libellants, who sue for property owned by them which was lost on board the schooner; and they were offered as witnesses on the hearing to prove the damages they had sustained, and the liability of the steamboat therefor.

Exceptions to their competency having been taken on the part of the claimants, the Court permitted that question to be argued, preliminarily to the hearing of the cause upon the merits.

F. B. Cutting, on the part of the libellants, argued that the witnesses were competent *ex necessitate*, and also in conformity to the practice of Admiralty Courts in

cases of wages and salvage. He cited 1 *Greenl. Ev.* 27; 12 *Vin. Ab.* 24, pl. 34; 12 *Johnson*, 461; 6 *Wend.* 407, 409; 4 *Wend.* 483; 11 *Wend.* 568; 16 *Wend.* 595-6; 2 *Wheat.* 111; *Note*, 117; 2 *Yeates' R.* 254; 4 *Dall.* 153; 1 *Greenl.* §§ 348, 350; *Dunlap Ad. Pr.* 264; 2 *Bro. Civ. & Ad.* 112; *Dunl.* 85, 89, 90; 1 *Sumn.* 402; 1 *Story*, 432; *Dunl.* 87; *Betts' Pr.* 57; 2 *Hagg.* 145.

L. B. Woodruff & George Wood controverted these positions and cited 6 *Peters*, 143; 2 *Brown's Penn. R.* 350; *Sloop Betsey*, 1 *Sumn.* 402, 432; 2 *Hagg.* 154; *Dunl.* 264-5; 1 *Peters' Ad.* 211.

BERRS, J.—The rule in equity established in the Courts of this State does not disqualify a party named on the record from being a witness in the cause, if he has no certain interest in the event. (1 *Johns. R.* 556; 2 *Cowen*, 186-189; 1 *Johns. Ch. R.* 550; 6 *Johns. Ch. R.* 212.) Some of the judges in those cases were indisposed to consider a mere contingent liability to costs as amounting to a disqualifying interest; but the present Chancellor seems to hold a party incompetent for that cause. (6 *Paige*, 565.)

At law the rule is clearly so, and parties to the record, who are merely nominal, or who consent to be sworn, are not admissible as witnesses when objected to. (4 *Johns. R.* 140; 20 *Johns. R.* 142; 1 *Wend.* 20; 4 *Wend.* 453; 7 *Cowen R.* 650; 19 *Wend.* 353.)

The rule of disqualification because of connection with the suit is not so stringent in all the States. The cases upon the subject exhibiting the diversity of the law in this respect are collected in *Cowen & Hill's Notes to*

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Phil. Ev. pp. 134—145 and 1548; Greenl. Ev. § 347; but this Court is not called upon to estimate their relative authority, or at liberty to discuss the question made as an open one. The Supreme Court of the United States has settled the law definitively, for all the national tribunals, that a party to the record is an incompetent witness in the cause. This is placed upon grounds of policy which does not admit of the exceptions recognised by other Courts. (*De Wolf v. Johnson*, 10 *Wheat R.* 367, 384; *Scott v. Lloyd*, 12 *Peters*, 145; *Stein v. Bowman*, 13 *Peters*, 209.)

A party is held disqualified to testify in such cause, although his interest be nominal or entirely extinguished, or be protected by a deposit of money, equal to any liability he may become subject to.

Proceedings in Maritime Courts are governed by general rules applicable to cases at law and in equity, where no special course has grown up from long usage in those Courts, or has not been appointed by positive law. (1 *Sumn.* 343, 344.) Prize causes and suits for salvage are prosecuted in the names of all parties interested in the recovery, and the suitors named in the pleadings are admitted as witnesses to sustain the action. This is put upon the ground of *necessity*; but it is also to be observed that those actions are founded in principles of public policy, and look to other results than the mere rights and rewards of individual suitors. They are equally anomalous in the permission to parties not having a common right and interest—on the contrary, often setting up interests hostile to each other—to unite in the same action, as in the admission of such parties to testify, not for each other alone, but each also for his personal interests.

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So by act of Congress, (*July 20, 1796, § 6,*) seamen are compelled to join in actions for wages earned in a common voyage, brought against the vessel; yet the suits are distinct and several, and have all the properties of actions prosecuted by parties independently of each other; (5 *Peters R.* 714;) and the co-libellants, in such actions, must accordingly be admissible witnesses for each other, as in separate suits. There is no common interest, even contingently, as to costs. If the decree be against the libel, one libellant is not chargeable with the costs incurred by the respondents on account of his co-libellant, and can only be made liable for those created by his individual claim.

Neither the claim of necessity, of long usage and custom, or the appointment of positive law, applies to the position or quality of the witnesses offered in this case. They are not brought forward as indispensable parties in the cause, and who are the only witnesses present, and capable of giving evidence to the facts in question. They stand upon the record as common sufferers for a tort, and in that position are disabled from testifying for their associates.

The case of the *Countess of Devon*, (2 *Hagg.* 145,) cited in support of the admissibility of these libellants to testify, stands on a different doctrine. The witnesses admitted in that case were not parties to the action, nor proved to be interested in its event.

I think the objection ought to prevail, and that the libellants must be excluded as witnesses in the cause.

A petition being subsequently presented to the Court, praying that the names of the master and crew of the schooner might be stricken from the record, an

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order to that effect was entered, and the testimony of these witnesses and other proofs were then offered in support of the allegations of the libel. The material facts will appear sufficiently in the opinion of the Court.

George Wood and L. B. Woodruff, for the claimants.

The burden of proof is on the libellants. (*Iron Duke*, 9 *Jurist*, 477.) The vessel complaining must be free from all blame. (*The Friends*, 1 *W. Rob.* 485; 1 *Rob. Adm. R.* 488; 3 *Carr. & P.* 531.)

F. B. Cutting, in reply, for the libellants.

The Neptune was palpably off her course; she must take the burden of accounting for her situation. (*The Perth*, 3 *Hagg.* 417; *Story on Bail.* §§ 608, 609, 611; 3 *Hagg.* 316; *The Jupiter*, 3 *Carr & Payne*, 528.)

Childs says he saw the schooner right ahead on her starboard, and he turned to windward. This was a violation of law. (*Abbott*, 234; *Story on Bail.* § 611; 3 *Kent*, 230; 7 *Law Reporter*, 222; *The Cynosure*, 3 *Hagg.* 320.) The steamboat should have kept off to starboard. (1 *Wm. Rob.* 481; *The Friends*, *Ib.* 467; *The Shannon*, 1 *Law Rep.* 313, 318; 7 *Law Rep.* 222; *The Narragansett*, *ante*, 246.) If it was dark, the Neptune was in fault in running at full speed. (3 *Hagg.* 417; *Ib.* 176; 13 *Peters' R.* 181.)

BETTS, J.—The importance which this controversy has assumed on account of the amount of loss incurred by the collision, and of the question of the right navigation of the respective vessels, has caused a more prolonged examination of testimony and a wider discussion at the hearing than would seem demanded by the intrinsic difficulties of the case.

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A sailing vessel and a steamboat running in opposite directions, came in collision on the Sound, in the night time. The injury was received chiefly by the schooner, which sunk directly after the collision. The libellants charge the act to have been wholly the fault of the steamer, and that they are entitled to full remuneration from her for their losses. The schooner is alleged to be worth \$3,000, and the property on board her, totally lost, about \$1,000.

The particulars on which the action is grounded stated in the libel, are, that the schooner was on her passage from Eastport, Maine, to New-York, and on the night of July 14, 1846, was standing about west, running about six or eight knots the hour, the wind being fresh and nearly north, when, between nine and ten P. M., she was run into by the steamboat Neptune, proceeding down the Sound from the city of New-York.

The schooner had passed the light-boat stationed on the Middle Ground nearly opposite Stratford Point, about one mile south of that boat. The night was clear, and the schooner could be easily discerned at a considerable distance from the steamer.

The schooner was cut nearly in two by the collision, and sunk almost immediately; the vessel, cargo, clothes, money and effects of the crew and passengers were totally lost, and two passengers, a woman and her child, were drowned.

The libel alleges that the steamboat was carelessly, improperly and unskilfully navigated, and the disaster was occasioned solely thereby. That her crew, and those having her management, were inexperienced and incompetent, or else were careless or negligent; and

that the disaster was occasioned without the fault of the schooner and her crew.

The libellants are bound to prove their own conduct correct, both in what was done or omitted to be done on board their vessel. If their acts caused the collision, or essentially conduced to it, they must bear the consequences, and cannot call upon the steamer to contribute to their satisfaction, unless it appears she was equally in fault. (2 *Hagg.* 154; *Catharine of Dover*, 2 *Ibid.* 360.)

They must further show that the schooner was well found, manned and equipped for the navigation in which she was employed; and they have no exemption in any of these particulars because the injury was received from a vessel propelled by steam. The action is for a tort. The complaining vessel must appear clear of blame, and also prove fault or negligence on the part of the other directly leading to the disaster. (*Ligo*, 2 *Hagg.* 356.)

The law no way justifies the notion that steam vessels are burthened with the sole risks and responsibilities of encounters with sailing vessels. The rule is reciprocal, placing both classes of vessels under a common liability and privilege; except that steamers are regarded as always possessing the means of a sailing vessel with a free wind, with the additional advantage of being able to stop their headway or take a retrograde movement.

Those means they are bound to employ to avoid a sailing vessel at anchor, or embarrassed in her position or movements, or when keeping her own course. This service is exacted of steam vessels in contribution to the common safety of navigation, and is due as well when

The Steamboat Neptune.

a sailing vessel is under difficulties from the improvidence or unskilfulness of those managing her, as if brought upon her by mischance, or without fault on her part.

A sailing vessel under way has no right to hold steamers approaching her, responsible under all circumstances, for her security against them. She has also an important duty to perform in preventing a collision. She must keep steadily the course she is running when near a steamer, or if she departs from it, the change must, if practicable, be made in a manner to aid the steamer in avoiding her.

If in this case the defence set up is established, that the schooner, when too near for the steamer by any manœuvre to escape her, luffed suddenly across the bows of the Neptune, and received the injury in that manner, the action cannot be sustained, and the claimants should be discharged from it with costs.

Upon this fact the pleadings and proofs are in direct conflict. That issue embraces the substantial merits of the case.

The question upon the competency of the libellant's witnesses to testify in the cause will be afterwards noticed.

Witnesses on the different vessels so habitually disagree in their opinions of the immediate or remote causes of a collision at sea, and of the incidents of the occurrence observed on both sides at the same time, that Courts can place little confidence in their expressions of opinion, and can rarely feel it prudent to decide causes of collision upon testimony of that character. Receiving with great distrust, the opinions and judgments of witnesses so circumstanced, however intelligent

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and worthy the individuals may be, the Court looks chiefly to facts stated by witnesses to have occurred within their personal knowledge. What a witness asserts he did at the time or did not do on his own vessel, is generally more satisfactory evidence of the fact than the opinions and belief of a dozen others, formed from what they supposed they saw or heard on another vessel.

(The Court here analyzed and collected carefully the testimony of the various witnesses; but it is not deemed necessary to the clear apprehension of the principles of this decision to report that part of the opinion.)

The men on the deck and the one at the wheel of the schooner all testify positively that no movement of her helm or change of her course was made when the steamer was coming upon her.

The effort of the claimants is to prove that the schooner suddenly luffed after the steamer had starboarded her helm and was going clear of her, and was thus thrown across the bows of the Neptune after it was too late for the latter to take any further measures to avoid her.

It is to be remarked that no witness on the steamer says he observed any change of the schooner's course until the wheel of the Neptune had been starboarded, and she began coming up to the wind. This movement, in a moment of alarm and the obscurity of the night, might easily have been attributed to the schooner, so that the latter would seem to the witnesses to be luffing, when her broadside was brought to view only because of a change of direction by the steamer.

I hold it not proved upon this evidence that the schooner was guilty of any fault or neglect in her movements, conducing to the collision.

The Steamboat Neptune.

Only one other fact respecting her conduct need be noticed. It is alleged that the schooner was concealed from the view of the Neptune by a thick black cloud, hanging over the eastern horizon, and that under those circumstances it was a fault on her part to run without exhibiting a light as a warning to vessels approaching her.

I shall not discuss the evidence upon this subject for the purpose of determining the degree of darkness occasioned by that state of the atmosphere. The witnesses differ widely in their estimates of that fact; but admitting the sky was in places or wholly overcast, directly before or at the time of the collision, the darkness is not proved to have been so dense as to prevent the schooner being seen far enough from the steamer to afford time to the latter to take precautions for avoiding her. The witnesses on the steamer state facts which afford a strong presumption that the schooner was in plain sight in sufficient time for the pilot to have stopped and backed the engine of the Neptune before the vessels came together; and it was a plain neglect of his duty not to take that precaution. (2 *Hagg.* 173; 3 *Hagg.* 414.)

There was, besides, a blameable want of prudence in the pilot in running the steamer at her full speed, if the obscuration of the sky was as great as he represents it to have been; and above all, there was culpable remissness in not placing a competent watch upon the forward deck, in a position giving the best advantage for a thorough look-out a head.

These were acts of gross carelessness, and of a character in themselves to cast upon the steamer the responsibility for the collision. I only add, in respect

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to the relative positions of the two vessels, that in my judgment the decided weight of evidence is that the Neptune was on a track to the south and leeward of the schooner, when her wheel was starboarded and her head veered to the north. This was a violation of nautical rules, and such want of care and skill as to render the steamer responsible for the consequences which followed. (*The Friends*, 1 W. Rob. 478.)

The question of the competency of the master and crew of the schooner to testify for the libellants in the cause was incidentally adverted to in the decision upon the motion to exclude them because parties to the record. The point has been presented again to the attention of the Court on this hearing, and after their names had been stricken from the pleadings.

Witnesses of this class it would seem were always regarded as admissible in Admiralty in causes of collision, although intimations are thrown out that it may be proper to take releases to obviate final objections. (3 *Hagg. R.* 323.) I see no necessity for this. The witnesses stand merely in the relation of servants and agents to the owners of the ship and cargo, acting within the plain scope of their authority. That character does not render them incompetent witnesses for their principal when he is a party to the suit. (1 *Greenl. Ev.* § 416; 1 *Phill. Ev.* 56, *Cowen & Hill's Notes*, p. 1525.)

The decree in this cause will accordingly be in favor of the libellants for the whole value of the schooner and cargo, with costs.

The Schooner Mary Ann Guest.

THE SCHOONER MARY ANN GUEST.

By the endorsement, for a valuable consideration, of a bill of lading of goods already at sea, the endorsee becomes, as against all the world, the owner of the goods, free from any equities subsisting between the consignor of the goods and the consignee.

It is no defence to an action by such endorsee of a bill of lading against the vessel, for damages for the non-delivery of the goods, to show that immediately on the arrival of the goods at the port of consignment they were seized in an action of replevin at suit of the consignor, he claiming a right of stoppage *in transitu* on the ground of insolvency of the consignee.

The master of the vessel had the right to hold the goods against the sheriff; and should have interposed in the replevin suit, and contested the claim to take the goods from his possession.

THIS was an action *in rem* for the recovery of \$1,050, upon a bill of lading assigned to the libellant, Townsend N. Underhill. He alleges in his libel that Whitney, Schott & Co., merchants of Philadelphia, on the 18th of February, 1846, shipped on board the said schooner, then lying in Philadelphia and bound to New-York, twelve cases of merchandise, marked and numbered as in the bill of lading, to be delivered in good order to Mr. W. C. Noyes, or his assigns, he or they paying freight at the rate of three cents per foot—five dollars forty cents in all; which bill of lading was duly executed and delivered to the said W. C. Noyes. He further alleges that said schooner arrived with said goods on board in New-York on or about the 27th of February aforesaid. He further alleges that on or about the 19th of said February he advanced to the said Noyes, \$1,050, on the faith of one of said bills of lading, then in the possession of said Noyes, who then endorsed and transferred to him said bill of lading.

The Schooner Mary Ann Guest.

That after the arrival of said vessel in New-York he went on board of her by his agent, and demanded the twelve cases of merchandise, and was informed by the mate, the captain being absent, that they had been delivered to some other person. He further alleges that he was ready and willing to pay the freight. He further avers that he is informed and believes that said merchandise was delivered to the sheriff of the city and county of New-York upon a writ of replevin, issued at the instance of Whitney, Schott & Co. against said W. C. Noyes; that the damage to said libellant by the non-delivery of said merchandise has been \$1,050, and the interest, commission and charges thereon. Wherefore he prays process of attachment against said schooner, and that she be sold, &c.

The respondent, for answer to said libel, admits the shipment of said merchandise, and the execution and delivery of the bills of lading as alleged, and avers that Whitney, Schott & Company caused to be issued from the Supreme Court of the city of New-York a writ of replevin, in which it was alleged that W. C. Noyes unjustly had taken and detained the said merchandise, and that by virtue of said writ the sheriff of said county, on the 24th of February, entered on board of said vessel, and there seized and took and carried away from said vessel said twelve boxes of merchandise. He denies that any loss or damage was caused to libellant by any act of the master of said schooner; and says that said merchandise could not be delivered for the reasons above set forth. Wherefore he prays that the libel be dismissed.

The bill of lading and its execution was admitted. It was also in proof that on the 19th of February, the

The Schooner Mary Ann Guest.

libellant was applied to by Noyes, the purchaser and consignee of the goods, for \$1,050, which he advanced; that the bill of lading was endorsed by Noyes and delivered to libellant at the time he advanced him this money; that as far as the witness, who was in the employ of Noyes, knew, Noyes was in fair standing for solvency. Libellant had been in the habit of advancing him money. It was also proved that a demand had been made for the goods, and the reply of the mate of the vessel was, that they had already been delivered to the sheriff, under a writ of replevin. It was also proved that the libellant offered to pay the freight upon the merchandise.

Nash, for the libellant.

Sanxay, for the claimants.

BETTS, J.—This was an action for the recovery of \$1,050, with interest upon the same, money advanced by libellant to the consignee of certain packages of goods shipped by him from Philadelphia to New-York. The consignee, desirous of raising that amount of money, applied to the libellant for the same upon the security of the bill of lading, which, upon the loan being made, was duly endorsed and delivered to him. There is nothing in the evidence to impugn the fairness of the transaction between the parties, and although it appears that the purchaser of the goods was probably insolvent at the time of the sale of the goods, it does not appear that the libellant was aware of the fact.

There is no doubt that if the purchaser had fraudu-

lently induced the seller to part with his goods by representing that he was solvent when the fact was otherwise, the vendor would have a right, by a stoppage *in transitu*, to reclaim the goods. Such fraudulent purchase, as between the vendor and vendee, would not divest the owner of his right and title to the goods. But when the vendor has, for a valuable consideration, parted with the possession of the goods, and third parties have innocently and in good faith purchased them from the vendee, the title of such third person cannot be disturbed by any equities which the original owner might have possessed. (6 *Metcalf R.* 68.)

For the convenience of commercial transactions, bills of lading have been allowed to become negotiable instruments: and upon the faith of them it is usual and customary for commission merchants to make advances. By such endorsement of the bill of lading the holder of it becomes, as against all the world, the owner of the goods. (*Conard v. The Atlantic Ins. Co.*, 1 *Peters' R.* 385; *Nathan v. Giles*, 5 *Taunt.* 558.) The bill of lading transfers the property to the consignee; and it seems to be conceded that the assignment of it by the consignee, by way of sale or mortgage, will pass the property, though no actual delivery of the goods be made, provided they were then at sea. (2 *Kent*, 549; *McNeil v. Glass*, 13 *Martin's R. (La.)* 261.)

It is no defence to the claim of the consignee, that the goods have been attached or seized by virtue of any judicial process. The contract of the carrier is, that he will deliver the goods in good order and condition to the shipper or to his assigns, (the dangers of the seas only excepted.) He thus guarantees to protect the right

The Steamboat Neptune.

A sailing vessel and a steamboat running in opposite directions, came in collision on the Sound, in the night time. The injury was received chiefly by the schooner, which sunk directly after the collision. The libellants charge the act to have been wholly the fault of the steamer, and that they are entitled to full remuneration from her for their losses. The schooner is alleged to be worth \$3,000, and the property on board her, totally lost, about \$1,000.

The particulars on which the action is grounded stated in the libel, are, that the schooner was on her passage from Eastport, Maine, to New-York, and on the night of July 14, 1846, was standing about west, running about six or eight knots the hour, the wind being fresh and nearly north, when, between nine and ten P. M., she was run into by the steamboat Neptune, proceeding down the Sound from the city of New-York.

The schooner had passed the light-boat stationed on the Middle Ground nearly opposite Stratford Point, about one mile south of that boat. The night was clear, and the schooner could be easily discerned at a considerable distance from the steamer.

The schooner was cut nearly in two by the collision, and sunk almost immediately; the vessel, cargo, clothes, money and effects of the crew and passengers were totally lost, and two passengers, a woman and her child, were drowned.

The libel alleges that the steamboat was carelessly, improperly and unskillfully navigated, and the disaster was occasioned solely thereby. That her crew, and those having her management, were inexperienced and incompetent, or else were careless or negligent; and

that the disaster was occasioned without the fault of the schooner and her crew.

The libellants are bound to prove their own conduct correct, both in what was done or omitted to be done on board their vessel. If their acts caused the collision, or essentially conduced to it, they must bear the consequences, and cannot call upon the steamer to contribute to their satisfaction, unless it appears she was equally in fault. (2 *Hagg.* 154; *Catharine of Dover*, 2 *Ibid.* 360.)

They must further show that the schooner was well found, manned and equipped for the navigation in which she was employed; and they have no exemption in any of these particulars because the injury was received from a vessel propelled by steam. The action is for a tort. The complaining vessel must appear clear of blame, and also prove fault or negligence on the part of the other directly leading to the disaster. (*Ligo*, 2 *Hagg.* 356.)

The law no way justifies the notion that steam vessels are burthened with the sole risks and responsibilities of encounters with sailing vessels. The rule is reciprocal, placing both classes of vessels under a common liability and privilege; except that steamers are regarded as always possessing the means of a sailing vessel with a free wind, with the additional advantage of being able to stop their headway or take a retrograde movement.

Those means they are bound to employ to avoid a sailing vessel at anchor, or embarrassed in her position or movements, or when keeping her own course. This service is exacted of steam vessels in contribution to the common safety of navigation, and is due as well when

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Witnesses on the different vessels so habitually disagree in their opinions of the immediate or remote causes of a collision at sea, and of the incidents of the occurrence observed on both sides at the same time, that Courts can place little confidence in their expressions of opinion, and can rarely feel it prudent to decide causes of collision upon testimony of that character. Receiving with great distrust, the opinions and judgments of witnesses so circumstanced, however intelligent

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The men on the deck and the one at the wheel of the schooner all testify positively that no movement of her helm or change of her course was made when the steamer was coming upon her.

The effort of the claimants is to prove that the schooner suddenly luffed after the steamer had starboarded her helm and was going clear of her, and was thus thrown across the bows of the Neptune after it was too late for the latter to take any further measures to avoid her.

It is to be remarked that no witness on the steamer says he observed any change of the schooner's course until the wheel of the Neptune had been starboarded, and she began coming up to the wind. This movement, in a moment of alarm and the obscurity of the night, might easily have been attributed to the schooner, so that the latter would seem to the witnesses to be luffing, when her broadside was brought to view only because of a change of direction by the steamer.

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Only one other fact respecting her conduct need be noticed. It is alleged that the schooner was concealed from the view of the *Neptune* by a thick black cloud, hanging over the eastern horizon, and that under those circumstances it was a fault on her part to run without exhibiting a light as a warning to vessels approaching her.

I shall not discuss the evidence upon this subject for the purpose of determining the degree of darkness occasioned by that state of the atmosphere. The witnesses differ widely in their estimates of that fact; but admitting the sky was in places or wholly overcast, directly before or at the time of the collision, the darkness is not proved to have been so dense as to prevent the schooner being seen far enough from the steamer to afford time to the latter to take precautions for avoiding her. The witnesses on the steamer state facts which afford a strong presumption that the schooner was in plain sight in sufficient time for the pilot to have stopped and backed the engine of the *Neptune* before the vessels came together; and it was a plain neglect of his duty not to take that precaution. (2 *Hagg.* 173; 3 *Hagg.* 414.)

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These were acts of gross carelessness, and of a character in themselves to cast upon the steamer the responsibility for the collision. I only add, in respect

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to the relative positions of the two vessels, that in my judgment the decided weight of evidence is that the Neptune was on a track to the south and leeward of the schooner, when her wheel was starboarded and her head veered to the north. This was a violation of nautical rules, and such want of care and skill as to render the steamer responsible for the consequences which followed. (*The Friends*, 1 W. Rob. 478.)

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The decree in this cause will accordingly be in favor of the libellants for the whole value of the schooner and cargo, with costs.

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It is no defence to an action by such endorsee of a bill of lading against the vessel, for damages for the non-delivery of the goods, to show that immediately on the arrival of the goods at the port of consignment they were seized in an action of replevin at suit of the consignor, he claiming a right of stoppage *in transitu* on the ground of insolvency of the consignee.

The master of the vessel had the right to hold the goods against the sheriff; and should have interposed in the replevin suit, and contested the claim to take the goods from his possession.

THIS was an action *in rem* for the recovery of \$1,050, upon a bill of lading assigned to the libellant, Townsend N. Underhill. He alleges in his libel that Whitney, Schott & Co., merchants of Philadelphia, on the 18th of February, 1846, shipped on board the said schooner, then lying in Philadelphia and bound to New-York, twelve cases of merchandise, marked and numbered as in the bill of lading, to be delivered in good order to Mr. W. C. Noyes, or his assigns, he or they paying freight at the rate of three cents per foot—five dollars forty cents in all; which bill of lading was duly executed and delivered to the said W. C. Noyes. He further alleges that said schooner arrived with said goods on board in New-York on or about the 27th of February aforesaid. He further alleges that on or about the 19th of said February he advanced to the said Noyes, \$1,050, on the faith of one of said bills of lading, then in the possession of said Noyes, who then endorsed and transferred to him said bill of lading.

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That after the arrival of said vessel in New-York he went on board of her by his agent, and demanded the twelve cases of merchandise, and was informed by the mate, the captain being absent, that they had been delivered to some other person. He further alleges that he was ready and willing to pay the freight. He further avers that he is informed and believes that said merchandise was delivered to the sheriff of the city and county of New-York upon a writ of replevin, issued at the instance of Whitney, Schott & Co. against said W. C. Noyes; that the damage to said libellant by the non-delivery of said merchandise has been \$1,050, and the interest, commission and charges thereon. Wherefore he prays process of attachment against said schooner, and that she be sold, &c.

The respondent, for answer to said libel, admits the shipment of said merchandise, and the execution and delivery of the bills of lading as alleged, and avers that Whitney, Schott & Company caused to be issued from the Supreme Court of the city of New-York a writ of replevin, in which it was alleged that W. C. Noyes unjustly had taken and detained the said merchandise, and that by virtue of said writ the sheriff of said county, on the 24th of February, entered on board of said vessel, and there seized and took and carried away from said vessel said twelve boxes of merchandise. He denies that any loss or damage was caused to libellant by any act of the master of said schooner; and says that said merchandise could not be delivered for the reasons above set forth. Wherefore he prays that the libel be dismissed.

The bill of lading and its execution was admitted. It was also in proof that on the 19th of February, the

The Steamboat Rhode Island.

excuse as he alleges it. (*Treadwell v. Joseph*, 1 Summ. R. 393.)

The feature distinguishing this case from collisions usually the subject of litigation, is, that both vessels propelled by steam, were going in the same direction. The collision occurred in Hell Gate, in the most confined and difficult part of that dangerous passage, where the boat prosecuted would be compelled to confine herself to a very narrow track, in making head against the tide, then running ebb with great force.

There was scarcely space to permit her exercising the precaution always laid upon one steamboat endeavoring to pass another, to keep off at a distance sufficient to obviate all danger of striking.

The statute law of this State imposes a penalty of \$250 on every steamboat so navigated as to approach or pass another ahead of it, going in the same direction, within the distance of twenty yards. (1 R. S. 682, § 7.)

The Rhode Island, in this case, rightfully or from unavoidable necessity, went into the Gate and beyond Hallett's Point; it is most probable upon the proofs, that she could not have been navigated a distance of twenty yards either side of the Naugatuck, without imminent danger of being thrown upon the Hog's Back on one side, or the Pot Rock on the other. Very little over 100 feet would be left between her and those rocks, and the hazard of a slight variation in her course in stemming a rapid current, or failing to answer her helm promptly, would make it imperative to crowd her as near to the centre of the passage as practicable, and as close to the boat ahead as she could be run.

Should she sheer in either direction in passing a boat at that point, and not be controlled almost instant-

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neously, she would incur extreme hazard of being precipitated upon the rocks closing on each side this contracted and perilous strait, especially if compelled to diverge more than the width of a boat from midway the pass. Indeed the defence, in a good measure, is placed upon the assumption that the Naugatuck was overtaken by the Rhode Island at a point, when it was impossible, by any movement or exertion within the power of the Rhode Island, to pass her without encounter.

The collision having then occurred by the act of the Rhode Island, either in running against the Naugatuck, or being so placed that the Naugatuck was inevitably driven upon her, the answer undertakes to show that the event was without fault on the part of the Rhode Island, and is ascribable to the negligence, want of skill or blameable conduct of the Naugatuck.

To this end, after replying specifically to the allegations of the libel by direct or qualified denials or admissions, the answer proceeds to set forth affirmatively the facts of the case constituting the defence which the claimants intend to maintain.

The specific issues so far admit the libellant's right of action as to impose on the claimants the necessity of avoiding it by establishing the excuses pleaded in the answer.

The answer throughout in its allegations, in reply to the charges of the libel and its affirmative averments, takes the ground that the fault of the collision was upon the Naugatuck, in omitting in two particulars to do what was incumbent on her to have done under the circumstances; first, to have edged up along the northerly side of the passage, thus opening it broadly to the boat

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in her rear; or, secondly, to have held her course in the middle of the stream, as she had it, when the Rhode-Island struck the true tide or current; and furthermore in adopting the unjustifiable and dangerous movement of running across the bow of the Rhode Island, after the latter had approached so near that it had become impossible then to extricate her from the consequences of that improper movement.

Whatever judgments the various witnesses produced by the claimants may have expressed respecting the position and movements of the Naugatuck, and in derogation of her proper navigation, anterior to the time the Rhode Island was thrown off from Hallett's Point by the current, and struck the true tide, cannot avail the defence further than they comport with the allegations of the answer. It is the case made by the answer which the libellants are called to combat, and not that which may be presented by the proofs when variant from or out of that stated in the pleadings.

The claimants must accordingly justify the conduct of the Rhode Island, in view of the position and actings of the Naugatuck as admitted and averred by the answer. She is by it placed about midway of the Gate, between Hallett's Point and the Hog's Back, moving very slowly, and heading the course for vessels passing through the Gate.

This position and course of the Naugatuck she could rightfully maintain, and the Rhode Island had no privilege or power to compel her to change either, or to interfere with her in them.

The law will not justify a vessel ahead varying her course or taking measures not indispensable to her own safety, to check or embarrass another vessel at

tempting to pass her. The waterway is alike common to both. But most clearly in reason, as well as upon principles of fixed law, the pursuing boat had only the privilege of such waterway as is not occupied by the leading one.

That path is closed to her, and the penalty denounced by the State law for so infringing upon it as to menace danger to the boat occupying it, is only giving precision to the general principles of maritime law, by fixing the nearest allowable point of approach, and settling the consequences of a violation of the rule. (1 *Rev. Stat.* 682, § 7; *Pardessus Cours Droit Com.* § 653.)

The approaching vessel, when she has command of her movements, takes upon herself the peril of determining whether a safe passage remains for her beside the one preceding her, and must bear the consequences of misjudgment in that respect. The law extends no immunity to the one possessing the greater speed, and so far from encouraging the exercise of that faculty to its utmost, cautiously warns and checks vessels propelled by steam against an improvident employment of speed so as to involve danger to others being stationary or moving with less. (8 *Law Rep.* 275; *The Ross*, 2 *Wm. Rob.* 1.)

Undoubtedly circumstances may occur, in which the leading vessel is bound to make way for the one pursuing her; such as two sailing vessels, under a gale of wind, in a narrow passage, and the rear one running up with most velocity, it would be the duty of the one ahead to give way so far as she could consistently with her own safety, in order to prevent disaster from the unmanageable condition of the other.

So far as a predicament of that character has been

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noticed by the Courts, it seems to be held, that both vessels running free, it is the duty of the leading one to give way, and for the one in pursuit to pass under her stern. (*Marsh v. Blythe*, 1 *McCord*, 360.)

If those considerations amount to a maritime rule, the claimants in this case would not be benefited by it; for upon their allegations, the Naugatuck was attempting the manœuvre of keeping away, so as to bring the Rhode Island under her stern, and the Rhode Island adopted the course counteracting that effort. But in my judgment, steamboats, having the power to slack their speed, and keep back from a vessel moving ahead with less velocity, are not entitled to exact from the other any thing more than to hold her own course, or not to select and keep one calculated to thwart and impede efforts of the one approaching to pass, when another course, equally safe and convenient, is open to her.

I think, moreover, that the claimants having a full knowledge (admitted by their answer) of the position and course of the Naugatuck before making the attempt to pass her, are chargeable with the consequences of the movement, unless they have shown that movement had become inevitable, from no fault imputable to them, and consequently that the injury was unavoidable, or that the Naugatuck suddenly deviated from her course and threw herself across their track.

If there was real danger to the Rhode Island in taking a course nearer the Hog's Back than the middle of the passage, she had no right to force that risk or danger on the Naugatuck, for her own ease or safety; for no testimony has made it clear that a small boat, with merely sufficient power to hold her way against the

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ebb, though steering with greater ease, could edge the rocks or veer about between them, by taking the tide on one bow and the other, with more security than a large one, having also in aid, on an emergency, steam force enough to drive her with high speed through an opposing tide.

The Rhode Island was unquestionably navigated skilfully and properly, on the assumption that there was room for her to pass the Naugatuck to the star-board side. She made her turn at the proper place to head the tide, and doubled Hallett's Point with great judgment and skill; but notwithstanding the strong asseveration of one of her pilots, and the opinion of other experts upon the facts stated, that she had no course safe for herself and passengers, after arriving at Flat Rock, but to press on to leeward of the Naugatuck, whatever peril such movement might bring to the latter, and to keep ahead with full power of steam, there is, in my judgment, a decided preponderance of evidence against those opinions, and it stands proved beyond all fair question, that her speed might have been slackened to the degree that only enough should be used to hold her against the tide; or that she might have been stopped and even anchored, or if imperatively necessary, she might have been brought round into the ship channel and headed back towards New-York, without advancing to the place where the Naugatuck was moving. Nor is it made by any means clear upon the proofs, that the Rhode Island herself would incur a less danger in running head on to an object moving in the middle of the passage than to go under its stern and between it and the Hog's Back Rock.

The latter might be a critical and perilous movement

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for her, if she was compelled to run north of midway of the Gate; but something more than a presumed and probable danger, however imminent that might be, should be established, to justify a Court in pronouncing that a heavy steamship may be plunged at the top of her power and speed, directly upon a light vessel in the middle of Hell Gate, rather than attempt a passage under her stern, and verging towards the rocks above.

The notion entertained and avowed by one of the pilots, that under like emergencies he would drive the Rhode Island ahead with her full power, should the gate-way be full of vessels, if really well founded, would render navigation through that strait alarmingly perilous to life and property.

Could such be the maritime right guaranteed a boat about to enter the Gate, the government would be compelled to interdict, under penalties which could not be encountered, the attempt of steamboats to crowd into the passage whilst it was occupied by other vessels.

The idea, however, is totally unsupported by law, reason or usage. No principle can be deduced from either source, justifying a steamboat, under one class of circumstances, placing herself in a position to inflict injuries upon other vessels at a particular point, which does not protect her, to the like degree, in every place where she may be voluntarily navigated.

Upon the statement in the answer that the Naugatuck, as the Rhode Island came to the ferry, was about midway of the gate, between Hallett's Point and Hogs' Back rock, heading the proper course for vessels passing through the Gate, the Rhode Island would stand without excuse in crowding upon that track so as to interfere with her, unless the claimants have succeeded in

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proving that the Naugatuck deviated from that course in a manner to produce the collision which ensued.

This the answer asserts, and it is claimed to be supported by the testimony of Christopher Mason and Stephen and Samuel B. Manchester.

The two Manchesters, captain and pilot, when the Rhode Island was abreast of Hallett's Point, observed the Naugatuck hauling to the southward, over towards the south shore. Their attention was directed to this by the second pilot saying the Naugatuck was running across their bows.

Mason, the second pilot, testifies, that when the Rhode Island struck the tide at Hallett's Point, and began taking her sheer, he spoke to the captain, and told him the Naugatuck was coming directly across their bows. He says the Naugatuck kept her course across the bows of the Rhode Island until she struck.

The first notice the persons at the wheel of the Rhode Island, directing her movements, thus appear to have had of the course of the Naugatuck and of the danger of the collision, was at Hallett's Point, and after she was surging off by the force of the tide towards the north side and into the track of the Naugatuck.

But Mr. Schuyler, a most intelligent witness, particularly experienced in navigation, and who at the time was alarmed at the position of the two boats, and was carefully watching their movements, says, as he passed Flood Rock he observed the Naugatuck just straightened up in the true tide half way across the Gate, and taking her course towards the south shore; and knowing that the Rhode Island could not go north of her without danger of the Hog's Back, he expected to rub her close, and walked forward to see the result. The

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Rhode Island had not then struck the true tide, and the Naugatuck did not appear to alter her course at all, but was edging towards the south shore.

Upon the just consideration of this testimony, it is plain that the answer is not supported in its representation that the collision was caused by a change of course made by the Naugatuck, after the Rhode Island had reached Hallett's Point.

The master and pilots cannot assert it, for they were paying no attention to the movements of the Naugatuck after she straightened in the true tide, until their boat was found to be driving rapidly in her track, and then they supposed the proximity was occasioned by her sheering upon them; and Mr. Schuyler proves the contrary, as he observed her bearing southward at Flat Rock, and noticed that she did not afterwards change her direction.

But the proof of the master and pilot of the Naugatuck is explicit and positive that her course was not varied south at all after she straightened in the true tide.

This testimony would be the most reliable if it stood in conflict with that from on board the Rhode Island, because these witnesses speak of their own acts in navigating the Naugatuck; facts which, it is not to be supposed, they misunderstood or had forgotten, whilst the others give their opinion and judgment of her steering. And in respect to this, it is to be observed, that the latter witnesses are placed on a moving object, going with great velocity, and forced by a powerful tide out of a right line, obliquely upon the Naugatuck. They would thus lose the power of distinguishing accurately between their own movement and that of the other

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vessel, and would naturally regard their approach to each other promoted by a seeming bearing of the Naugatuck upon them.

This discordance between the inferences and judgment of one class of witnesses, so formed, and the statement of facts by those knowing them as they actually existed, showing such conclusions and inferences to be inaccurate, is not to be regarded a conflict of evidence, in any way putting in issue the veracity or intelligence of the respective witnesses.

Another fact is established by the testimony of Wheeler and Curtis, pilots of the Naugatuck, which shows that error of judgment under which the course of the Rhode Island was determined. They say the propeller came to in the right tide, with her helm midships, nearer the south than the right shore of the Gate; and they and Captain Osborn all state she was on her true course, just brought into the tide, on an even helm, when the Rhode Island took her sheer at the Point, and was discerned coming upon her, and the course was not altered except by the efforts to bear up as the Rhode Island came on her.

Upon the supposition that the propeller was in the middle of the Gate, Mr. Schuyler considered the Rhode Island must rub close in passing, and that her whole power of steam was necessary to carry her to starboard.

Manchester, the pilot of the Rhode Island, testifies that he observed the Naugatuck straightened up, before he got to Flood Rock, and then supposed she was pretty well over to Hog's Back.

Captain Manchester states that he saw her from the same place, about midway of the Gate; she seemed

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straight in the tide, and going round Negro Point, (which is on the north shore,) and he apprehended no danger of collision from that position of the propeller. He first discovered the danger at Hallett's Point, when he discovered her heading over towards the south shore, and, as he judged, nearly for the south side of the Pot.

Christopher Mason, the second pilot, also noticed the Naugatuck from Flood Rock—saw her straighten her course, heading directly through the Gate, and, as he thought, to the northward side of the Pot, and about the usual distance from it to head the tide.

These witnesses, accordingly, were managing their boat under a misapprehension of the true position of the Naugatuck, and under the supposition that the passage-way was open to them on her starboard side.

Notwithstanding the rash and startling declaration of Manchester, the pilot, that he should not have stopped or slowed his boat between Flood Rock and the Point, if he had known the actual course of the Naugatuck, and should not slow her at that place and put her in danger, to avoid running over forty thousand propellers, the conduct of the master on the occasion falsifies the ridiculous bravado, and shows that he knew it to be his duty to slow and stop his boat in the midst of the current, the instant he became aware of the hazardous proximity of the two.

The misjudgment of facts on board the Rhode Island was no way induced by any improper act or omission on board the other boat, and the claimants accordingly are rendered by law responsible for its consequences.

It is to be also remarked that a very slight slackening of the speed of the Rhode Island would have avoided

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the disaster; as although on Mr. Schuyler's estimate the engine was checked only twelve seconds, the boats were so nearly separated that the collision occurred aft of midships of the Naugatuck.

This was leaving the Rhode Island under the momentum of a full head of steam; it is accordingly palpable that, if she had been run from Flood Rock with only the power necessary to her perfect safety, the Naugatuck would have been entirely out of her track, when she recovered her sheer in the Gate.

Upon these views of the case, the following decree will be entered therein:

"The cause having been heard upon the pleadings and proofs in this case, and the arguments of the respective advocates thereon being carefully examined and considered, and it appearing to the Court that the collision in the pleadings mentioned was occasioned by the neglect, want of due precaution and care on the part of the steamboat Rhode Island, and those conducting and managing her, and the libellants were guilty of no omission or misconduct leading thereto; it is considered by the Court that the steamboat Rhode Island is liable for the damages occasioned thereby.

"Wherefore it is ordered and decreed by the Court, that the libellants recover the damages by them sustained by means of the premises, and that the Rhode Island be condemned therefor, with costs to be taxed.

"It is further ordered, that it be referred to a commissioner to inquire into and ascertain the damages sustained by the libellants thereby, and for the loss of the time of their propeller whilst necessarily delayed in receiving repairs therefor, and report to the Court with all convenient speed."

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A

ACTION.

1. The principles touching the duties of seamen, under a contract of hiring on a sea voyage, are binding upon those engaged in the navigation of inland tide waters. A suit for wages cannot be maintained until the contract of service is performed or released. *The Steamboat Swallow*, 4
2. In an action *in rem* against a vessel, the Court cannot take cognizance of collateral equities to enforce them against parties *personally*, not made parties to the proceedings, where such decree may be prejudicial to their interests. *The Schooner Leonidas*, 13
3. The inhabitants of Oyster Bay township have the exclusive right to the oyster fishing within that bay. And the town has authority to enact and enforce by-law, in support and protection of that right. *The Sloop Martha Anne*, 18
4. But process issued by a justice of the peace, under the authority of those laws, cannot be executed on the Sound. 18
5. The seizure and detention of the libellant's vessel, for the purpose of executing such process on board her, was a maritime trespass, and tort. 18
6. An action *in rem* against the vessel attached, and *in personam* against the respondent, her master, will lie in this Court for the tort. 18
7. The libellant is entitled to recover damages in this action, in satisfaction of the injury he has sustained. 18
8. But those damages should be mitigated upon the consideration that the respondent was acting under the command of officers of the law, and without intention to do the libellant wrong. 18
9. In this country it is clear that salvage compensation may be obtained in Admiralty for services rendered within the ebb and flow of the tide, without regard to location, whether on the high seas or *inter fauces terrarum*. *The Brig John Gilpin*, 77
10. Assurers acquire by abandonment to them of property insured and a satisfaction of their policies, all the present rights and remedies of the assured thereto, together with the *spes recuperandi*. *The Mutual Safety Insurance Company v. The Cargo of the Brig George*, 89
11. Those rights and remedies may be presented or proceeded upon in Admiralty Courts, by the assurers in their own names. 18

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noticed by the Courts, it seems to be held, that both vessels running free, it is the duty of the leading one to give way, and for the one in pursuit to pass under her stern. (*Marsh v. Blythe*, 1 *McCord*, 360.)

If those considerations amount to a maritime rule, the claimants in this case would not be benefited by it; for upon their allegations, the Naugatuck was attempting the manœuvre of keeping away, so as to bring the Rhode Island under her stern, and the Rhode Island adopted the course counteracting that effort. But in my judgment, steamboats, having the power to slack their speed, and keep back from a vessel moving ahead with less velocity, are not entitled to exact from the other any thing more than to hold her own course, or not to select and keep one calculated to thwart and impede efforts of the one approaching to pass, when another course, equally safe and convenient, is open to her.

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The idea, however, is totally unsupported by law, reason or usage. No principle can be deduced from either source, justifying a steamboat, under one class of circumstances, placing herself in a position to inflict injuries upon other vessels at a particular point, which does not protect her, to the like degree, in every place where she may be voluntarily navigated.

Upon the statement in the answer that the Naugatuck, as the Rhode Island came to the ferry, was about midway of the gate, between Hallett's Point and Hogs' Back rock, heading the proper course for vessels passing through the Gate, the Rhode Island would stand without excuse in crowding upon that track so as to interfere with her, unless the claimants have succeeded in

The Steamboat Rhode Island.

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The first notice the persons at the wheel of the Rhode Island, directing her movements, thus appear to have had of the course of the Naugatuck and of the danger of the collision, was at Hallett's Point, and after she was surging off by the force of the tide towards the north side and into the track of the Naugatuck.

But Mr. Schuyler, a most intelligent witness, particularly experienced in navigation, and who at the time was alarmed at the position of the two boats, and was carefully watching their movements, says, as he passed Flood Rock he observed the Naugatuck just straightened up in the true tide half way across the Gate, and taking her course towards the south shore; and knowing that the Rhode Island could not go north of her without danger of the Hog's Back, he expected to rub her close, and walked forward to see the result. The

9. Long experience has demonstrated the importance to the protection of vessels navigating up and down the East River, to hold to the centre of it, as nearly as may be, and it is culpable conduct to move a steam tug from place to place, by running her along near the ends of the piers. *Ib.*
10. The master of the tug is bound to put her out into the stream, so as to disclose clearly her position and direction. *Ib.*
11. A vessel having the wind free and meeting another on the wind, must generally take the risk of avoiding the latter; and if the latter varies from her course for any cause, she loses all claim to compensation in case of collision, and may, moreover, subject herself to damages. *The Brig Emily,* 132
12. So when two vessels are approaching each other in that manner, and there is danger of a collision—if the one on the wind departs from her course, but for necessary cause, she must bear the consequences of the collision which ensues. *Ib.*
13. It is not culpable or improper conduct for the officer on deck to take the helm of a vessel, and to receive and act upon the direction of the look-out as to the mode of steering her. *The Pilot Boat Blossom,* 188
14. A vessel running with the wind free must give way to another close-hauled, without regard to their respective tacks. *Ib.*
15. Sailing vessels coming into port in the night time are not bound to carry lights. *Ib.*
16. If a steamer wrongfully placed herself in the track of another vessel, and in such circumstances as allowed the other no chance of avoiding a collision, the former is answerable for all the damages which might have been occasioned by her running into the other. *The Steamboat Narragansett,* 246
17. If a steamer and sailing vessel are approaching each other in such directions that a collision may be reasonably apprehended, it is the duty of the steamer to take proper precautions for avoiding the sailing vessel, particularly so if the latter be close-hauled on a wind. *Ib.*
18. A vessel, although towed by a steamboat, if she has the full control of her own movements, will be liable for any damages inflicted by her coming in contact with another vessel. *The Steamer Express,* 258
19. The master and owners of a ship towed by a steamer will be answerable for damages occasioned by a collision with another vessel, unless they use all possible skill and care to prevent it. *Ib.*
20. A vessel coming in collision with another vessel is *prima facie* liable for the damage, and the rule is not varied whether her motive power is the old and ordinary method or is supplied in some novel manner. *Ib.*
21. Third parties, receiving an injury by collision, can rarely be required to lay the responsibility to any other agency than that which was the proximate cause. *Ib.*
22. If a vessel is run upon by another under way, the latter must be answerable for the wrong, unless she can prove the occurrence to be the result of inevitable accident or without fault on her side. *Ib.*
23. A tug will not be responsible for damages done by vessels in her tow, whether they be lashed alongside or drawn by hawsers, except it be proved that the injury was owing to want of care or skill in the tug in performing the duties belonging to her. *Ib.*
24. The analogy of principal and agent does not apply to this description of business. The tug, in executing the employment for which she is engaged, acts independently of all authority or direction of the tow, while the tow was in this case master of her own movements, and so answerable for them. *Ib.*
25. A vessel on the wind has the right

- to run out her tack, and it is the duty of another vessel approaching her before the wind to take the necessary precautions to avoid a collision. *The Sloop Argus*, 304
26. A vessel running free has no right to cross the bows of a beating vessel, unless she had clearly room to do it without disturbing her course; nor to come so closely upon the stern of the other as to create apprehensions of a collision, and alarm her into a change of her course to escape it. *Ib.*
27. A vessel close-hauled on the wind has a right to rely to the last moment on the ability and care of another meeting her with the wind free, to avoid a collision, and is not responsible for a wrong movement on her part, caused by the negligence of the one running free; but a vessel close-hauled is bound to hold her tack so as not to come round in the way of one free and endeavoring to avoid her. *Ib.*
28. Admiralty has jurisdiction in a cause of collision between vessels when the injury is received in a slip where the tide ebbs and flows between piers or wharves in this port. *The Bark Lotty*, 329
29. The master of the vessel on board at the time is responsible for the wrongful act of the vessel, although it was consequential to the neglect or misfeasance of a licensed pilot in securing her improperly to a wharf. *Ib.*
30. It is an act of neglect and unsafe to leave a vessel in the winter season, during the night, at a wharf on the north side of the city, moored with only a single seven-eighth inch chain. *Ib.*
31. It is gross and culpable neglect to suffer her to remain in that situation in a high and increasing wind, augmented to a violent gale, in which her fastenings parted. *Ib.*
32. The authority of a licensed pilot in securing a vessel in her berth is not paramount to that of her master; the latter is deemed in full command, and the acts of the pilot are regarded as done with the direction or approval of the master. *Ib.*
33. It is not a *vis major* which excuses a master, that his vessel had caused damages to another in a tempest of wind, when he had warning and sufficient opportunity to protect her from that hazard. *Ib.*
34. In a collision between two passenger steamboats, occurring at their place of departure, both starting from the same slip or pier at the same time, they will be mutually held responsible for the exercise of the utmost prudence and precaution. *The Steamboat Boston*, 407
35. Neither can lawfully press ahead of the other in getting under way, when it is apparent their movements are commenced simultaneously. *Ib.*
36. If they are competitor boats, running the same route, negligence or fault in producing the collision will be imputed equally to each, unless one clearly exculpates herself. *Ib.*
37. The law of this State imposes a penalty on a steamboat for attempting to pass another under way nearer than twenty yards, and the maritime law subjects them to all damages caused by crowding on vessels under way to pass them or in crossing their bows. *Ib.*
38. Steamboats having greater facilities than vessels under canvass to avoid collisions when they are brought in proximity to each other, are bound to give way to sailing vessels when practicable, or take other proper precautions within their means for avoiding collisions. *The Steamboat New Jersey*, 415
39. But steamers are not bound to insure the safety of sailing vessels against their own negligence or misconduct. A sailing vessel is bound to exercise equal care, skill and prudence in passing a steamer as another sailing vessel; the only distinction being that in respect to a steamer, the vessel under sail is to adhere to her own course as far as practicable

time, will be equivalent to payment to the master. 71

11. An agreement by the master to pay a part of the charterer to the consignee, without any consideration, is a custom practice, and void. 71

12. It is no defense to an action by an endorsee of a bill of lading against the vessel for damages for the non-delivery of the goods, to show that immediately on the arrival of the goods at the port of destination they were stored in an action of replevin, at suit of the consignee, claiming a right of stoppage in transit on the ground of non-payment of the consignee. *The Schooner Mary Ann Grant*, 490

13. The master of the vessel had the right to hold the goods against the sheriff, and should have interposed in the replevin suit and contested the claim to take the goods from his possession. 71

BILL OF LADING,
DAMAGES, 1, 2, 3, 4.
DEVIATION, 2, 3, 4, 5.
DILIGENCE, 1, 2.
PRACTICE, 26, 27.

CONSIGNOR AND CONSIGNEE.

COMMON CARRIER, 2, 2, 4, 5, 10, 11, 12, 13, 14, 15, 16, 17.

CONTRACT.

A hiring at monthly wages imports that the engagement is by the month, terminable with each month at the option of either party. If the party hired leaves before the expiration of the month he loses the whole wages; if he is discharged before its termination, he recovers for the whole time. *The Steamboat Hudson*, 396

COSTS.

1. When a sailor brings a suit in rem against a ship to enforce a conditional agreement made with the master, and outside of the written articles,

he will be required to file a stipulation for costs in the same manner as an ordinary matter. *The Ship Green Dragon*, 1

2. A party will not be allowed to tack a small undisputed claim upon which he has never made a demand, to a contested claim for wages denied him, to recover costs on the demand denied him. *The Steamboat Seafarer*, 4

3. Full costs will be decreed the claimant, although the demand of the libellant is less than \$50 to each. 71

4. A libellant who demands an entire sum when part of it has been paid according to his directions, and compels the respondent to defend, imposes his equity to costs in a Court of Admiralty. *Shaw v. Thompson*, 144

5. A respondent who contests the entire demand of a libellant when a portion of it is justly claimed, although he defends the suit in the main matters in contestation, loses his equity to costs. 71

6. Admiralty Courts in adjudging costs in their discretion, regard the essential merits and equities of the parties rather than the result of the litigation. 71

7. And may withhold costs from both parties when neither proposes to do what is substantially just between them without litigation. 71

8. Costs are technically awarded to parties, but substantially they belong to the proctor to the suit, and the Court will uphold his right to them against acts of the principal to his prejudice. *Collins v. Hathaway*, 176

9. Where several seamen unite in an action in personam to recover wages, all of whom except one obtain decrees for \$50 and over, which are appealed to the Circuit Court, and a decree is rendered in favor of the other libellant for less than \$50, he can tax full costs in his own name, and perfect and enforce by execution his decree for wages and costs. The causes of action and the final decree are all

- separate, and the remedy is as in a separate action. *Ib.*
10. The rule relieving seamen from stipulations for costs produces no unreasonable inequality as against ship-owners. *Ib.*
11. An irregularity in the taxation of costs may be corrected by the Court on motion after final decree rendered. *Ib.*
12. The practice is liberal in allowing a re-taxation of costs where by mistake, misapprehension or other casualty, a party failed opposing the original taxation, particularly where the costs claimed are large. *Ib.*
13. Under the rules of this Court, suits *in rem* for services on board of vessels in the North River, a libellant cannot recover costs when less than \$50 is in demand if he had a clear remedy therefor known to him in the local Courts. *The Schooner Harriet*, 184
14. The *onus* is upon the claimant to show that the libellant had such remedy to entitle himself to a decree for costs. *Ib.*
15. The object of this rule was to prevent an unnecessary resort to the expensive proceeding *in rem*. It will be so enforced as to compel the mariner to resort to the local Courts only in case his remedy there is convenient and sure. *Ib.*
16. A similar doctrine prevails in the civil law, and is also employed as a means for preventing the creation of costs unnecessarily in the prosecution of demands. *Ib.*
17. When one of the libellants unites a demand for contract wages unpaid him with his claim for short allowance, and obtains a decree for those wages, the Court will only allow him proportionate costs against the vessel on that demand, not including witnesses fees to his co-libellants, and will order full costs against him in connection with his co-libellants upon the other branch of the litigation. *The Bark Childs Harold*, 275
18. The prevailing party in Admiralty suits is *prima facie* entitled to recover costs. The decree in his favor implies that he has been wrongfully delayed or prosecuted. *The Ship Moslem*, 274
19. Still the common law rule to give costs in all cases to the successful suitor is not recognised in Admiralty as the law of costs, and they are awarded at the sound discretion of the Court, without regard to the ultimate termination of the action. *Ib.*
20. A seaman will be denied costs in a suit for a small balance of wages due him when payment of the balance has not been demanded of the master or owner of the ship, and no refusal to pay them has been made by either, and particularly if the seaman tacks to the debt other distinct and unsupported claims, and sues for the whole conjointly. *Ib.*
21. This Court will not allow costs on the arrest of a vessel for a small cause of action, when the party has adequate remedy in the lower municipal courts, and especially if the suit is prosecuted vindictively and with a view to create costs. *The Steamboat Boston*, 408
22. When seven exceptions are filed to a commissioner's report, and six are sustained by the Court, costs will be allowed therefor, to be deducted from the amount decreed to the libellant. *The Steamboat New-Jersey*, 444
- ACTION, 19, 26.
 PRACTICE, 11, 16, 17, 18, 19, 20.
- COURTS
- The Federal Courts are governed, in commercial and maritime cases, by the general, and not by the local law. *The Mutual Safety Insurance Company v. The Cargo of the Brig George*, 89
- STATE COURTS.
- CROSS ACTION.
- ACTION, 13, 14.
 DEVIATION, 6.

D

DAMAGES.

1. When parties fix no time for the delivery of a cargo, the Court will not adopt any supposed one as the proper time, nor if the value of the cargo is found greater at such period than at that of its actual delivery, award the difference as damages to the shippers. *The Bark Gentlemen*, 110
2. A ship is not answerable for damages to a perishable cargo, occasioned by an unusually protracted voyage, unless the delay is owing to the fault of the master or owner. *Id.*
3. That a voyage between particular ports is usually performed within a specified period of time, is not a circumstance which of itself imports culpable negligence, or want of skill, or competency in the crew of a vessel which occupies double that time in making it. *Id.*
4. The fact that a cargo of raw hides, shipped in good order on the west coast of Africa, the 2d of October, and transported to New-York in the hold of the vessel, unexposed to the atmosphere, arrived there the 18th of January following, injured by heat and worms, is competent evidence to prove the damage was caused by the long continuance of the voyage. *Id.*
5. The damages in case of collision to be adjudged against the party in fault, must be sufficient to restore the injured vessel to the condition she was in at the time of the collision. *The Pilot Boat Blossom*, 188
6. Actual injuries only are to be compensated for. The Courts do not consider hypothetical or consequential damages. *Id.*
7. In case of collision, the party injured is entitled to recover the actual damages sustained, but cannot claim such as are merely consequential. *The Steamboat Narragansett*, 246
8. The actual damages sustained by a collision at sea are to be paid by the faulty vessel, both in respect to ship and cargo. *Id.*
9. The colliding vessel is not exonerated from full damages, because after the wreck a portion of the cargo was injured or lost through the efforts of a third vessel to save it. *Id.*
10. A ship having left a seaman at Valparaiso, and immediately thereafter proceeded to Callao, where she was sold to foreigners, and taken into their employ on a different voyage, he was not bound to rejoin her, or to offer to do so if within his power. In such case the owners are liable to the seaman in damages for the breach of the shipping contract on their part. These damages are not made vindictive on the footing of a wilful tort, but are usually measured by the actual loss to the seaman. *Nevitt v. Clarke*, 366
11. Damages caused by collision will be awarded against the colliding vessel adequate to the full recompense of the injured vessel and cargo. *The Steamboat Narragansett*, 388
12. The loss of the use of the injured vessel whilst undergoing repairs is so directly consequential to the collision as to be entitled to compensation. *Id.*
13. The owners of the injured vessel will be allowed salvage expenses and other charges necessarily paid by them in rescuing the vessel and cargo from perils they were placed in by the collision. *Id.*
14. Services of a salvage character expended in saving and restoring the injured vessel and cargo will be compensated by salvage rewards, and not limited to a *quantum meruit* for mere work and labor. *Id.*
15. A *bona fide* adjustment of such claims and charges between parties interested in the vessel and cargo, will be accepted by the Court as a proper mode of fixing the valuation of the services. *Id.*

16. The commissioner's report of damages, when parties have been fully heard before him with their proofs, and no question of law is involved in his decision, will be adopted by the Court, unless palpable errors or inadvertencies have been committed by him. *Id.*

17. In the valuation of damages caused by a collision, the owner of the injured vessel is entitled to be recompensed to the amount of his entire loss. *The Steamboat New-Jersey*, 444

18. When the value of the vessel injured is only impaired, the measure of damages will be the sum required to reinstate her to the condition she was in at the time of collision; if she is a total loss, her market price or value at the time will be the criterion. *Id.*

19. The colliding vessel cannot diminish the allowance of her market value by proving her actual worth to be less because of her age, imperfect build, or the state of her timbers. *Id.*

20. The direct damages occasioned by a collision, and also reasonable demurrage for a period necessary to reinstate the injured vessel, will be charged upon the colliding vessel in fault. *The Steamboat Rhode Island*, 505

ACTION, 7, 8.
COMMON CARRIER, 9.
DEVIATION, 7.
JURISDICTION, 2.
LIEN, 11.

DECREE.

Where a party proceeded against is named in the body of the libel, a decree *secundum allegata et probata* may be rendered against him, although he is not named in the prayer for relief. *Novitt v. Clarke*, 316

DELIVERY.

COMMON CARRIER, 2, 3, 4, 5.
DAMAGES, 1.

DESERPTION.

If a seaman, sent on shore in the employment of the ship, neglects to return to his duty, the ship continuing at the port a sufficient time to give him opportunity to do so, the master in the mean time making inquiry for him, such voluntary absence will be a desertion, and forfeit his wages. *Pichl v. Balchen*, 24

DEVIATION.

1. Where a ship on a voyage from Manila to New-York went into Cape Town leaking, and there received partial repairs, and on survey was pronounced seaworthy, and shipped seamen for the home voyage, but in order to have the advantage of the trade winds and smoother seas, and sooner to reach a suitable port for repairs, made for Pernambuco, that is not such a deviation as to discharge the seamen from their obligations to her. But if the master intended to take that course when he shipped the crew, or left Cape Town, he was bound to make it known to them. *The Ship Moslem*, 289

2. An intention of the master of a ship to depart from her direct voyage and stop at an intermediate port for the purpose of taking in additional cargo, if assented to or made known to a shipper when bills of lading are executed to him, is not a deviation which annuls the contract of affreightment on his part. *Thatcher v. McCulloch*, 365

3. If it might amount to a violation of the contract *per se*, the acceptance of the cargo by the shipper, with knowledge of the fact of deviation, restores to the ship-owner his right to freight. *Id.*

4. The known usage of trade and navigation from New-Orleans to northern ports, in the summer season, to touch at Havana for further cargo, prevents such act being a deviation, although the freighter had no notice of the intention of the master to make that port on the particular voyage. *Id.*

5. Although the further stopping at Key West on the voyage, without the assent or knowledge of the freighter, is an unwarranted deviation which may avoid the contract of affreightment at the option of the freighter, his acceptance of the cargo, with full knowledge of the deviation, reinstates in the master the right to recover the freight; but receiving the cargo in that manner does not deprive the consignee of a right of action for any special damages he may have sustained because of the deviation. *Id.*
6. The Court is not under the necessity of driving the consignee to a cross-action in such case, nor for recovery of other damages or claims arising out of the contract, but may adjust and recompense his damages by way of recoupment in the action prosecuted for freight. *Id.*
7. Those damages may embrace whatever could be demanded by a cross-action for the non-fulfilment of the contract of affreightment, including extra premiums of insurance paid because of the deviations on the voyage. *Id.*

SHIPPING ARTICLES, 4.

DISCHARGE.

SEAMEN, 6, 7, 14, 16.

DISCONTINUANCE.

PRACTICE, 11.

DOUBLE WAGES.

ACTION, 15, 16, 17, 18, 19.

E

EAST RIVER.

COLLISION, 8, 9, 10.

EVIDENCE.

1. The testimony of a ship's crew, being joint libellants, each swearing for the other, will be received with great caution. The Court will be more inclined to credit the master of the vessel, when the evidence between them is contradictory, and he has no interest in the action. *The Steamboat Swallow*, 4
2. A receipt signed by a seaman at the end of an eight months' voyage, acknowledging the payment of \$9, in full of all demands against the ship, will not bar his suit for wages and short allowance, without proof of an adequate compensation actually paid him. *Piehl v. Balchen*, 24
3. The master of a vessel who hypothecated her on bottomry, is a competent witness in favor of the holder of the bottomry, particularly if released by him. *Furniss v. The Brig Magoun*, 85
4. The adjustment of average in case of sale of the goods at the place of disaster, before reaching the port of destination, may be in relation to the sale price. *The Mutual Safety Insurance Company v. The Cargo of the Brig George*, 89
5. When no sale is made at such place, the value at the place of shipment will govern. *Id.*
6. The policies do not of themselves supply proof of the value of ship, cargo or freight on general average. *Id.*
7. But the adjusters can receive the policies as auxiliary evidence of those values. Invoices and bills of lading are competent evidence of the value of the cargo at the place of its purchase and shipment. *Id.*
8. A receipt, alleged to be given through mistake, may be explained by parol evidence. *Shaw v. Thompson*, 144
9. When there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to the credit of them on both sides,

- the balance of evidence will be regarded as in favor of the party having the greatest number. *The Brig Napoleon*, 208
10. The testimony of the libellants themselves in an action *in rem*, the one for the other, although legally admissible, ought to be narrowly scrutinized and received with caution. *Graham v. Hoskins*, 224
11. In determining the merits in a case of collision, the Court will look chiefly to the facts in proof, and will pay but slight attention to the opinions and hypotheses of witnesses, especially those of each ship's company, in respect to the acts of the other. *The Steamboat Narragansett*, 246
12. Witnesses upon a vessel in motion, looking at another also in motion, cannot determine by the eye, unaided otherwise, with reliable exactness, either her course, distance or speed. *Ib.*
13. Plans and diagrams intended to exhibit the courses, bearings and distances of two vessels approaching each other, are of no value as evidence, when framed merely upon the conjecture or opinion of witnesses as to the speed, relative bearing and distances of the vessels. *Ib.*
14. The estimate or judgment of witnesses formed in the night time, and expressed orally, or exhibited on charts or diagrams, on a vessel in motion, are of slight weight in determining the relative position and bearing of another vessel, also under motion. *The Sloop Argus*, 304
15. A master of a vessel is a competent witness for the owners in a suit *in rem* for wages by one of the ship's company. *The Steamboat Hudson*, 396
16. Loose declarations or admissions extracted from or freely made by portions of a crew directly after a wreck from collision, will have but slight weight in invalidating their deliberate testimony to the facts. *The Steamboat New Jersey*, 415
17. In an action *in rem* for a collision, the answer of the owners of the colliding vessel, admitting facts to their prejudice, will prevail in favor of the libellants, against the testimony of the pilot of the vessel to the contrary. *The Santa Claus*, 428
18. When a witness is examined *de bene esse* out of Court in an Admiralty cause, by the claimants, and is cross-examined by the libellant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness because interested in the cause, and exclude his testimony given in chief for the claimants. *The Brig Osceola*, 450
19. The claimants, on proving a reasonable excuse for not producing the shipping articles on trial, may contradict by parol evidence the statement of their contents by the mariner. *Ib.*
20. The statement of the seaman is incompetent evidence to prove services rendered by him on board the vessel under shipping articles. *Ib.*
21. In a suit upon shipping articles by a seaman to recover wages for a voyage, if the articles are not produced by the master or owner at the trial, after due requirement by the seaman, his statement of the contents thereof, when disputed, will be *prima facie* evidence of the same. *Ib.*
22. But a call for the articles at the time of trial is not a sufficient requirement, unless it be made to appear they are then in the presence of the Court, or directly within the control of the master or owner. *Ib.*
23. *Quere.* If the statement of the mariner is proof of any more than the master is bound by section 1 of the Act of July 20, 1790, to insert in the articles to wit: "a declaration of the voyage or voyages, term or terms of time, for which the seaman or mariner shall be shipped?" *Ib.*
24. In actions in the federal Courts, parties to the record cannot be examined as witnesses. *The Steamboat Neptune*, 488

25. The Federal Courts will, upon motion, and for good cause shown, authorize the name of a party to be stricken from the pleadings; and he can then be examined as a witness, subject to all legal objections. *Id.*

26. The master and crew of a vessel are competent witnesses for the owner of the vessel in a case of collision. *Id.*

27. The positive testimony of witnesses to their own acts at the time of a collision, is entitled to outweigh the opinions and belief of out-numbering witnesses who judged of such acts from the opposite vessel. *Id.*

AVERAGE, 4, 5, 6, 7.
BURDEN OF PROOF.
DAMAGES, 4.
PRACTICE, 5, 28.
SEA-WORTHINESS, 3, 4.

F

FREIGHT.

COMMON CARRIER, 12, 13, 14, 15, 16.

H

HELL GATE.

COLLISION, 51.

HUDSON RIVER.

ACTION, 28.
COSTS, 13.
USAGE.

I

INLAND NAVIGATION.

ACTION, 1.

INSURANCE.

ACTION, 10, 11.

AVERAGE.

EVIDENCE, 3, 4, 5, 6, 7.

INTEREST.

Interest is allowed on liquidated demands in Admiralty the same as at law, and on seamen's wages from the time they are due. *The Steamboat Swallow*, 334

J

JURISDICTION.

1. This Court has jurisdiction on the instance side over maritime torts committed within the ebb and flow of tide. *The Sloop Martha Anne*, 18

2. The Court will not, upon a summary application of a claimant, inquire into damages caused him by an unfounded arrest of his ship. *The Brig Oriole*, 67

3. Nor will it assume power to coerce parties into issues not raised in the pleadings filed in the cause. *Id.*

4. A mariner rendering services on board of a vessel carrying coal between Philadelphia and New-York upon tide waters, though she be stripped of sails and masts, and be towed by steamboats, may proceed in rem against such vessel for his wages. *The Coal Boat D. C. Salisbury*, 71

5. The common law "wreck of the sea," if found within high-water mark on shore, is within the privilege of salvage. *The Brig John Gilpin*, 77

6. Admiralty has jurisdiction of cases of general average upon losses at sea. *The Mutual Safety Insurance Company v. The Cargo of the Brig George*, 89

7. The federal Courts have jurisdiction of actions for wages for services on

board foreign vessels. *The Brig Napoleon*, 208

8. These actions will be entertained of right in behalf of American seamen against foreign vessels, owners or masters; and will also be readily sustained in behalf of foreign seamen against masters or owners of foreign vessels when the voyage terminates or is broken up in an American port, or foreign seamen are discharged from a foreign ship there, and are necessitous. But the Courts are unwilling under other circumstances to support such actions, and will discourage their prosecution in our tribunals. *Id.*

9. An allegation in the answer that all the parties are foreigners and the ship is foreign property, must be proved by the respondent or claimant. *Id.*

10. Services rendered on board a ship while at the dock at Liverpool do not give to the demand for wages a maritime character of which an Admiralty Court can take cognizance. *Graham v. Hoskins*, 224

11. Courts of a foreign power will not take cognizance of the claims of seamen for their wages only in cases of flagrant wrong or suffering on their part, but not upon an alleged breach of contract, much less to decide upon a *quantum meruit*. They should seek redress from their own consul. *Id.*

ACTION, 2, 9, 26.

COLLISION, 28.

MARSHALLING OF CLAIMS, 5.

SURPLUS MONIES, 2.

L

LIBEL AND ANSWER.

1. Where an answer is made without oath, as authorized by Rule 87, it should still respond fully and particularly to every material averment of the libel. *The Brig Aldebaran*, 130

2. Mere narrative statements in a libel, which allege no damages, and claim

no particular remedy, need not be replied to specifically by answer. *Id.*

PRACTICE, 12, 13, 14, 29.

SEAMEN'S WAGES, 2.

LIEN.

1. Compressing cotton in a cotton press is a mere shore business, for the purpose of arranging the bulk for more convenient carriage and stowage. The expense of the work is no lien on the ship upon which the cotton is to be freighted, and an action *in rem* cannot be maintained therefor. *The Bark Joseph Cunard*, 120

2. Neither costs of advertising a vessel for sea, portage nor commissions for procuring freight, wages of stevedores or lightermen, are liens on the ship, suable *in rem*. *Id.*

3. Where no materials are furnished or labor bestowed in the refitment or reparation of vessels, services which are entitled to take the rank and character of maritime are such as are performed in aid of the ship's company or the navigation of the vessel, and are rendered while she is afloat upon tide waters. *The Ship Harriet*, 229

4. A watchman employed on board a domestic vessel is under the State law, entitled to a lien upon her for his services, provided they amount to over fifty dollars, and he may sue therefor in his own name in Admiralty. *Id.*

5. Services rendered in taking care of a ship in port are, under the statutes of the State, protected by a lien upon the ship, unless the claimant shows that less than fifty dollars is due for such service. *The Ship Harvest*, 271

6. The claimant, by not tendering the amount really due, subjects himself to the liability for such amount and costs. *Id.*

7. The mere giving of a promissory note by the debtor for supplies furnished a ship is no satisfaction of the debt, nor is it a waiver of the lien

and when so doing is not manifestly
perilous to both or either. *Id.*

40. A sailing vessel suing a steamer for damages from a collision, must prove that the injury was not produced by her own negligence or fault; particularly that she did not depart from her course when near the steamer without a clear necessity for so doing. *Id.*
41. A vessel wrongfully or carelessly interposed in the track of another, so as to render a collision inevitable to the latter, is responsible therefor the same as if the blow was given by her movement directly against the one striking her. *Id.*
42. The rule that two steam vessels going in opposite directions, and meeting in the night time, shall each port her helm, and both pass to the larboard, is not of absolute obligation. *The Santa Claus*, 428
43. When one steamboat is ascending a river at her larboard side, within sixty or seventy feet of the shore, and another is descending on her starboard so far off as to leave ample room for her safe passage, the two are not so meeting within the sense of the rule as to justify the descending boat attempting to run in shore of the other, or to require the latter to port her helm and steer to the starboard. *Id.*
44. Sailing vessels meeting steamers at sea must use due precautions to avoid coming in collision with them; as by taking care not to impede their course, or embarrass their navigation. *The Steamboat Neptune*, 488
45. In an action for damages incurred to a sailing vessel through collision with a steamboat, the libellants must prove the sailing vessel clear of all culpable conduct conducing to the collision. Steamers are not bound to guard sailing vessels against their own misconduct. *Id.*
46. It is the duty of a steamer to take prudent measures in ample season for avoiding a sailing vessel, when the two are approaching. *Id.*
47. Sailing vessels are not bound to have lights suspended in the night time. *Id.*
48. When two steamboats are running in the same direction, the leading one is entitled to hold her course, and the one pursuing must at her peril select one safe to herself, if she makes an attempt to pass. *The Steamboat Rhode Island*, *Id.*
49. One steamboat cannot approach another within a distance of twenty yards, in an attempt to run by. *Id.*
50. The leading boat must, however, so use her privilege as not intentionally to thwart or prevent the one in the rear from using her superior speed; but is not bound by law to accommodate her by moving to either side to give her more ample room. *Id.*
51. This rule equally applies to the narrow and dangerous passage in Hell Gate. The stern boat cannot compel the forward one there to make place for her, but must avoid going into the Gate, or must slack or stop her speed, if she is likely to endanger the one ahead. *Id.*

DAMAGES, 5, 6, 7, 8, 9, 11, 12, 13, 14,

15, 16, 17, 18, 19, 20.

EVIDENCE, 11, 12, 13, 14, 26, 27.

NEGLECTOR, 3, 4, 5, 6, 7, 8.

USAGE, 5.

COMMON CARRIER.

1. The holder of a bill of lading has a remedy in Admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel *in rem*, where the goods shipped on board are not delivered. *The Schooner Leonidas*, 12
2. By the established course and custom of the coasting trade in New-York, goods on freight may be delivered at the wharf, and need not be tendered personally to consignees. The ship cannot abandon goods on the wharf, because of the inability or refusal of

- the consignee to receive them. *The Ship Grafton*, 43
3. A delivery of a cargo on the wharf in New-York, with notice to the owners, of the time and place of unloading, places the goods at their risk, and discharges the ship from liability. *Id.*
4. The master's responsibility in delivering the cargo is measured by the practice and usage of the place. A ship cannot be compelled to lay idle, because some consignees apprehend bad weather, and decline to receive their cargo, if the time be reasonably favorable for unloading. All the shippers of cargo have a right to require dispatch in the unloading of the cargo, that their goods need not be detained. *Id.*
5. Although the consignees give notice to the ship that they will not receive the cargo because of the unfavorable state of the weather, or other reason, but do accept and remove it in part as delivered from the ship, they cannot claim indemnity from the ship for injury to the cargo by a storm to which it was exposed whilst on conveyance to its place of storage. *Id.*
6. Where goods are shipped in good order, and are damaged on the voyage, it devolves on the owner of the ship to show that the damage was caused by fault of the freighter, or by *vis major*. *The Ship Mariha*, 140
7. Libellant shipped 840 bundles of sheet iron on freight from Liverpool to New-York, giving a bill of lading that the same was received in good order, and to be delivered in like good order, the perils of the sea excepted; when unladen it was found to be stained and rusted by wet, and injured thereby; and notwithstanding proof that the iron was well stowed, that the ship came in tight and dry, that the iron was taken on board in dry weather, and not exposed to the access of water, the vessel was answerable for the damage. The burden of proof is upon the ship to show that the damage existed when the cargo was laden on board. *Id.*
8. The acknowledgment in the bill of lading that the cargo is received in good order, though part of the shipping contract, may be explained or disproved by parol testimony. *Id.*
9. *Quere*. Whether a general ship is liable for damages to cargo well stowed, caused by exhalations or dampness arising from the cargo on board, (also well stowed,) unless there be a special contract in the affreightment against such loss or injury? *Id.*
10. A consignee of a charterer, and dealing with him in that character, must be presumed to know the contents of the charter-party. *Shaw v. Thompson*, 144
11. He cannot deal with the charterer as owner for the voyage, when by the charter-party the entire possession and control of the vessel remains with the master and owner. *Id.*
12. If the consignee in such case credits the freight on the consignment to him on debts owing him by the charterer, he will not thereby acquit himself of liability to the master therefor. *Id.*
13. The payment to the charterer will be on the responsibility of the charterer, and not on that of the vessel or her owner. *Id.*
14. The master, notwithstanding any interference or direction of the charterer, has a right to retain the goods until his lien shall be satisfied, and he may sue the consignees after delivery to them of the goods, and recover the freight, at least to the amount due on the charter-party. *Id.*
15. Where the consignee has notice that freight must be paid to the master and not to the charterer, it imposes the like obligation upon him as if so reserved in the bill of lading. *Id.*
16. A consignee has no right to appropriate moneys due for freight to satisfy advances made by him to the charterer, although the bill of lading directs the freight to be paid to the consignee. But a direction to the consignee by the master to pay a sum out of the freights to the char-

terer, will be equivalent to payment to the master. *Id.*

17. An agreement by the master to pay a debt of the charterer to the consignee, without any consideration, is a *nudum pactum*, and void. *Id.*

18. It is no defence to an action by an endorsee of a bill of lading against the vessel for damages for the non-delivery of the goods, to show that immediately on the arrival of the goods at the port of consignment they were seized in an action of replevin, at suit of the consignor, claiming a right of stoppage *in transitu* on the ground of insolvency of the consignee. *The Schooner Mary Ann Guest*, 498

19. The master of the vessel had the right to hold the goods against the sheriff, and should have interposed in the replevin suit and contested the claim to take the goods from his possession. *Id.*

BILL OF LADING.
DAMAGES, 1, 2, 3, 4.
DEVIATION, 2, 3, 4, 5.
NEGLECT, 1, 2.
PRACTICE, 26, 27.

CONSIGNOR AND CONSIGNEE.

- COMMON CARRIER, 2, 3, 4, 5, 10, 11, 12, 13, 14, 15, 16, 17.

CONTRACT.

- A hiring at monthly wages imports that the engagement is by the month, terminable with each month at the option of either party. If the party hired leaves before the expiration of the month he loses the whole wages; if he is discharged before its termination, he recovers for the whole time. *The Steamboat Hudson*, 398

COSTS.

1. When a sailor brings a suit *in rem* against a ship to enforce a conditional agreement made with the master, and outside of the written articles,

he will be required to file a stipulation for costs in the same manner as an ordinary suitor. *The Ship Great Britain*, 1

2. A party will not be allowed, by tacking a small undisputed claim, upon which he has never made a demand, to a contested claim for wages denied him, to recover costs on the demand denied him. *The Steamboat Swallow*, 4

3. Full costs will be decreed the claimant, although the demand of the libellants is less than \$50 to each. *Id.*

4. A libellant who demands an entire sum when part of it has been paid according to his directions, and compels the respondent to defend, impairs his equity to costs in a Court of Admiralty. *Shaw v. Thompson*, 144

5. A respondent who contests the entire demand of a libellant when a portion of it is justly claimed, although he defeats the suit in the main matters in contestation, loses his equity to costs. *Id.*

6. Admiralty Courts in adjudging costs in their discretion, regard the essential merits and equities of the parties rather than the result of the litigation. *Id.*

7. And may withhold costs from both parties when neither proposes to do what is substantially just between them without litigation. *Id.*

8. Costs are technically awarded to parties, but substantially they belong to the proctor to the suit, and the Court will uphold his right to them against acts of the principal to his prejudice. *Collins v. Hathaway*, 176

9. Where several seamen unite in an action *in personam* to recover wages, all of whom except one obtain decrees for \$50 and over, which are appealed to the Circuit Court, and a decree is rendered in favor of the other libellant for less than \$50, he can tax full costs in his own name, and perfect and enforce by execution his decree for wages and costs. The causes of action and the final decree are all

- separate, and the remedy is as in a separate action. *Ib.*
10. The rule relieving seamen from stipulations for costs produces no unreasonable inequality as against ship-owners. *Ib.*
11. An irregularity in the taxation of costs may be corrected by the Court on motion after final decree rendered. *Ib.*
12. The practice is liberal in allowing a re-taxation of costs where by mistake, misapprehension or other casualty, a party failed opposing the original taxation, particularly where the costs claimed are large. *Ib.*
13. Under the rules of this Court, suits *in rem* for services on board of vessels in the North River, a libellant cannot recover costs when less than \$50 is in demand if he had a clear remedy therefor known to him in the local Courts. *The Schooner Harriet*, 184
14. The *onus* is upon the claimant to show that the libellant had such remedy to entitle himself to a decree for costs. *Ib.*
15. The object of this rule was to prevent an unnecessary resort to the expensive proceeding *in rem*. It will be so enforced as to compel the mariner to resort to the local Courts only in case his remedy there is convenient and sure. *Ib.*
16. A similar doctrine prevails in the civil law, and is also employed as a means for preventing the creation of costs unnecessarily in the prosecution of demands. *Ib.*
17. When one of the libellants unites a demand for contract wages unpaid him with his claim for short allowance, and obtains a decree for those wages, the Court will only allow him proportionate costs against the vessel on that demand, not including witnesses fees to his co-libellants, and will order full costs against him in connection with his co-libellants upon the other branch of the litigation. *The Bark Childs Harold*, 275
18. The prevailing party in Admiralty suits is *prima facie* entitled to recover costs. The decree in his favor implies that he has been wrongfully delayed or prosecuted. *The Ship Moslem*, 874
19. Still the common law rule to give costs in all cases to the successful suitor is not recognised in Admiralty as the law of costs, and they are awarded at the sound discretion of the Court, without regard to the ultimate termination of the action. *Ib.*
20. A seaman will be denied costs in a suit for a small balance of wages due him when payment of the balance has not been demanded of the master or owner of the ship, and no refusal to pay them has been made by either, and particularly if the seaman tacks to the debt other distinct and unsupported claims, and sues for the whole conjointly. *Ib.*
21. This Court will not allow costs on the arrest of a vessel for a small cause of action, when the party has adequate remedy in the lower municipal courts, and especially if the suit is prosecuted vindictively and with a view to create costs. *The Steamboat Boston*, 408
22. When seven exceptions are filed to a commissioner's report, and six are sustained by the Court, costs will be allowed therefor, to be deducted from the amount decreed to the libellant. *The Steamboat New-Jersey*, 444
- ACTION, 19, 26.
PRACTICE, 11, 16, 17, 18, 19, 20.
- COURTS
- The Federal Courts are governed, in commercial and maritime cases, by the general, and not by the local law. *The Mutual Safety Insurance Company v. The Cargo of the Brig George*, 89
- STATE COURTS.
- CROSS ACTION.
- ACTION, 13, 14.
DEVIATION, 6.

D

DAMAGES.

1. When parties fix no time for the delivery of a cargo, the Court will not adopt any supposed one as the proper time, nor if the value of the cargo is found greater at such period than at that of its actual delivery, award the difference as damages to the shippers. *The Bark Gentleman*, 110
2. A ship is not answerable for damages to a perishable cargo, occasioned by an unusually protracted voyage, unless the delay is owing to the fault of the master or owner. *Id.*
3. That a voyage between particular ports is usually performed within a specified period of time, is not a circumstance which of itself imports culpable negligence, or want of skill, or competency in the crew of a vessel which occupies double that time in making it. *Id.*
4. The fact that a cargo of raw hides, shipped in good order on the west coast of Africa, the 2d of October, and transported to New-York in the hold of the vessel, unexposed to the atmosphere, arrived there the 18th of January following, injured by heat and worms, is competent evidence to prove the damage was caused by the long continuance of the voyage. *Id.*
5. The damages in case of collision to be adjudged against the party in fault, must be sufficient to restore the injured vessel to the condition she was in at the time of the collision. *The Pilot Boat Blossom*, 188
6. Actual injuries only are to be compensated for. The Courts do not consider hypothetical or consequential damages. *Id.*
7. In case of collision, the party injured is entitled to recover the actual damages sustained, but cannot claim such as are merely consequential. *The Steamboat Narragansett*, 246
8. The actual damages sustained by a collision at sea are to be paid by the faulty vessel, both in respect to ship and cargo. *Id.*
9. The colliding vessel is not exonerated from full damages, because after the wreck a portion of the cargo was injured or lost through the efforts of a third vessel to save it. *Id.*
10. A ship having left a seaman at Valparaiso, and immediately thereafter proceeded to Callao, where she was sold to foreigners, and taken into their employ on a different voyage, he was not bound to rejoin her, or to offer to do so if within his power. In such case the owners are liable to the seaman in damages for the breach of the shipping contract on their part. These damages are not made vindictive on the footing of a wilful tort, but are usually measured by the actual loss to the seaman. *Nesitt v. Clarke*, 366
11. Damages caused by collision will be awarded against the colliding vessel adequate to the full recompense of the injured vessel and cargo. *The Steamboat Narragansett*, 288
12. The loss of the use of the injured vessel whilst undergoing repairs is so directly consequential to the collision as to be entitled to compensation. *Id.*
13. The owners of the injured vessel will be allowed salvage expenses and other charges necessarily paid by them in rescuing the vessel and cargo from perils they were placed in by the collision. *Id.*
14. Services of a salvage character expended in saving and restoring the injured vessel and cargo will be compensated by salvage rewards, and not limited to a *quantum meruit* for mere work and labor. *Id.*
15. A *bona fide* adjustment of such claims and charges between parties interested in the vessel and cargo, will be accepted by the Court as a proper mode of fixing the valuation of the services. *Id.*

16. The commissioner's report of damages, when parties have been fully heard before him with their proofs, and no question of law is involved in his decision, will be adopted by the Court, unless palpable errors or inadvertencies have been committed by him. *Id.*

17. In the valuation of damages caused by a collision, the owner of the injured vessel is entitled to be recompensed to the amount of his entire loss. *The Steamboat New-Jersey*, 444

18. When the value of the vessel injured is only impaired, the measure of damages will be the sum required to reinstate her to the condition she was in at the time of collision; if she is a total loss, her market price or value at the time will be the criterion. *Id.*

19. The colliding vessel cannot diminish the allowance of her market value by proving her actual worth to be less because of her age, imperfect build, or the state of her timbers. *Id.*

20. The direct damages occasioned by a collision, and also reasonable demurrage for a period necessary to reinstate the injured vessel, will be charged upon the colliding vessel in fault. *The Steamboat Rhode Island*, 505

ACTION, 7, 8.
COMMON CARRIER, 9.
DEVIATION, 7.
JURISDICTION, 2.
LAW, 11.

DECREE

Where a party proceeded against is named in the body of the libel, a decree *secundum allegata et probata* may be rendered against him, although he is not named in the prayer for relief. *Novitt v. Clarke*, 316

DELIVERY.

COMMON CARRIER, 2, 3, 4, 5.
DAMAGES, 1.

DESERTION.

If a seaman, sent on shore in the employment of the ship, neglects to return to his duty, the ship continuing at the port a sufficient time to give him opportunity to do so, the master in the mean time making inquiry for him, such voluntary absence will be a desertion, and forfeit his wages. *Piehl v. Balchen*, 24

DEVIATION.

1. Where a ship on a voyage from Manilla to New-York went into Cape Town leaking, and there received partial repairs, and on survey was pronounced seaworthy, and shipped seamen for the home voyage, but in order to have the advantage of the trade winds and smoother seas, and sooner to reach a suitable port for repairs, made for Pernambuco, that is not such a deviation as to discharge the seamen from their obligations to her. But if the master intended to take that course when he shipped the crew, or left Cape Town, he was bound to make it known to them. *The Ship Moelem*, 289

2. An intention of the master of a ship to depart from her direct voyage and stop at an intermediate port for the purpose of taking in additional cargo, if assented to or made known to a shipper when bills of lading are executed to him, is not a deviation which annuls the contract of affreightment on his part. *Thatcher v. McOulloch*, 265

3. If it might amount to a violation of the contract *per se*, the acceptance of the cargo by the shipper, with knowledge of the fact of deviation, restores to the ship-owner his right to freight. *Id.*

4. The known usage of trade and navigation from New-Orleans to northern ports, in the summer season, to touch at Havana for further cargo, prevents such act being a deviation, although the freighter had no notice of the intention of the master to make that port on the particular voyage. *Id.*

5. Although the further stopping at Key West on the voyage, without the assent or knowledge of the freighter, is an unwarranted deviation which may avoid the contract of affreightment at the option of the freighter, his acceptance of the cargo, with full knowledge of the deviation, reinstates in the master the right to recover the freight; but receiving the cargo in that manner does not deprive the consignee of a right of action for any special damages he may have sustained because of the deviation. *Id.*

6. The Court is not under the necessity of driving the consignee to a cross-action in such case, nor for recovery of other damages or claims arising out of the contract, but may adjust and recompense his damages by way of recoupment in the action prosecuted for freight. *Id.*

7. Those damages may embrace whatever could be demanded by a cross-action for the non-fulfilment of the contract of affreightment, including extra premiums of insurance paid because of the deviations on the voyage. *Id.*

SHIPPING ARTICLES, 4.

DISCHARGE.

SEAMEN, 6, 7, 14, 16.

DISCONTINUANCE.

PRACTICE, 11.

DOUBLE WAGES.

ACTION, 15, 16, 17, 18, 19.

E

EAST RIVER.

COLLISION, 8, 9, 10.

EVIDENCE.

1. The testimony of a ship's crew, being joint libellants, each swearing for the other, will be received with great caution. The Court will be more inclined to credit the master of the vessel, when the evidence between them is contradictory, and he has no interest in the action. *The Steamboat Swallow*, 4

2. A receipt signed by a seaman at the end of an eight months' voyage, acknowledging the payment of \$2, in full of all demands against the ship, will not bar his suit for wages and short allowance, without proof of an adequate compensation actually paid him. *Piehl v. Balchen*, 24

3. The master of a vessel who hypotheated her on bottomry, is a competent witness in favor of the holder of the bottomry, particularly if released by him. *Furniss v. The Brig Magoun*, 55

4. The adjustment of average in case of sale of the goods at the place of disaster, before reaching the port of destination, may be in relation to the sale price. *The Mutual Safety Insurance Company v. The Cargo of the Brig George*, 39

5. When no sale is made at such place, the value at the place of shipment will govern. *Id.*

6. The policies do not of themselves supply proof of the value of ship, cargo or freight on general average. *Id.*

7. But the adjusters can receive the policies as auxiliary evidence of those values. Invoices and bills of lading are competent evidence of the value of the cargo at the place of its purchase and shipment. *Id.*

8. A receipt, alleged to be given through mistake, may be explained by parol evidence. *Shaw v. Thompson*, 144

9. When there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to the credit of them on both sides,

- the balance of evidence will be regarded as in favor of the party having the greatest number. *The Brig Napoleon*, 208
10. The testimony of the libellants themselves in an action *in rem*, the one for the other, although legally admissible, ought to be narrowly scrutinized and received with caution. *Graham v. Hoskins*, 224
11. In determining the merits in a case of collision, the Court will look chiefly to the facts in proof, and will pay but slight attention to the opinions and hypotheses of witnesses, especially those of each ship's company, in respect to the acts of the other. *The Steamboat Narragansett*, 246
12. Witnesses upon a vessel in motion, looking at another also in motion, cannot determine by the eye, unaided otherwise, with reliable exactness, either her course, distance or speed. *Id.*
13. Plans and diagrams intended to exhibit the courses, bearings and distances of two vessels approaching each other, are of no value as evidence, when framed merely upon the conjecture or opinion of witnesses as to the speed, relative bearing and distances of the vessels. *Id.*
14. The estimate or judgment of witnesses formed in the night time, and expressed orally, or exhibited on charts or diagrams, on a vessel in motion, are of slight weight in determining the relative position and bearing of another vessel, also under motion. *The Sloop Argus*, 304
15. A master of a vessel is a competent witness for the owners in a suit *in rem* for wages by one of the ship's company. *The Steamboat Hudson*, 396
16. Loose declarations or admissions extracted from or freely made by portions of a crew directly after a wreck from collision, will have but slight weight in invalidating their deliberate testimony to the facts. *The Steamboat New Jersey*, 415
17. In an action *in rem* for a collision, the answer of the owners of the colliding vessel, admitting facts to their prejudice, will prevail in favor of the libellants, against the testimony of the pilot of the vessel to the contrary. *The Santa Claus*, 428
18. When a witness is examined *de bene esse* out of Court in an Admiralty cause, by the claimants, and is cross-examined by the libellant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness because interested in the cause, and exclude his testimony given in chief for the claimants. *The Brig Occochee*, 450
19. The claimants, on proving a reasonable excuse for not producing the shipping articles on trial, may contradict by parol evidence the statement of their contents by the mariner. *Id.*
20. The statement of the seaman is incompetent evidence to prove services rendered by him on board the vessel under shipping articles. *Id.*
21. In a suit upon shipping articles by a seaman to recover wages for a voyage, if the articles are not produced by the master or owner at the trial, after due requirement by the seaman, his statement of the contents thereof, when disputed, will be *prima facie* evidence of the same. *Id.*
22. But a call for the articles at the time of trial is not a sufficient requirement, unless it be made to appear they are then in the presence of the Court, or directly within the control of the master or owner. *Id.*
23. *Quere.* If the statement of the mariner is proof of any more than the master is bound by section 1 of the Act of July 30, 1790, to insert in the articles to wit: "a declaration of the voyage or voyages, term or terms of time, for which the seaman or mariner shall be shipped?" *Id.*
24. In actions in the federal Courts, parties to the record cannot be examined as witnesses. *The Steamboat Neptune*, 453

24. The Federal Courts will, upon motion, and for good cause shown, set aside the verdict of a jury in its decision from the pleadings, and its own facts be construed as a witness subject to all legal objections. *Id.*

25. The master and crew of a vessel are competent witnesses for the owner of the vessel in a case of collision. *Id.*

26. The positive testimony of witnesses to their own acts at the time of a collision, is entitled to outweigh the opinions and belief of out-numbering witnesses who judged of such acts from the opposite vessel. *Id.*

AVIATION, 4, 5, 6, 7.
BOMBING OF PRISON.
DAMAGES, 4.
PRACTICE, 5, 23.
SEA-WORKINGMEN, 2, 4.

F

FREIGHT.

COMMON CARRIER, 12, 13, 14, 15, 16.

H

HELL GATE.

COLLISION, 51.

HUDSON RIVER.

ACTION, 28.
COSTS, 13.
USAGE.

I

INLAND NAVIGATION.

ACTION, 1.

INSURANCE.

ACTION, 21, 22.
ASSURANCE.
BOMBING, 2, 4, 5, 6, 7.

INTEREST.

Interest is allowed on liquidated demands in Admiralty the same as at law, and on unliquidated wages from the time they are due. *The Steamship Southern*, 326.

J

JURISDICTION.

1. This Court has jurisdiction on the instance side over maritime torts committed within the ebb and flow of tide. *The Sloop Martha Anne*, 18.

2. The Court will not, upon a summary application of a claimant, inquire into damages caused him by an unfounded arrest of his ship. *The Brig Oriole*, 67.

3. Nor will it assume power to coerce parties into issues not raised in the pleadings filed in the cause. *Id.*

4. A mariner rendering services on board of a vessel carrying coal between Philadelphia and New-York upon tide waters, though she be stripped of sails and masts, and be towed by steamboats, may proceed in rem against such vessel for his wages. *The Coal Boat D. C. Salisbury*, 71.

5. The common law "wreck of the sea," if found within high-water mark on shore, is within the privilege of salvage. *The Brig John Gilpin*, 77.

6. Admiralty has jurisdiction of cases of general average upon losses at sea. *The Mutual Safety Insurance Company v. The Cargo of the Brig George*, 89.

7. The federal Courts have jurisdiction of actions for wages for services on

board foreign vessels. *The Brig Napoleon*, 208

8. These actions will be entertained of right in behalf of American seamen against foreign vessels, owners or masters; and will also be readily sustained in behalf of foreign seamen against masters or owners of foreign vessels when the voyage terminates or is broken up in an American port, or foreign seamen are discharged from a foreign ship there, and are necessitous. But the Courts are unwilling under other circumstances to support such actions, and will discourage their prosecution in our tribunals. *Id.*

9. An allegation in the answer that all the parties are foreigners and the ship is foreign property, must be proved by the respondent or claimant. *Id.*

10. Services rendered on board a ship while at the dock at Liverpool do not give to the demand for wages a maritime character of which an Admiralty Court can take cognizance. *Graham v. Hoskins*, 224

11. Courts of a foreign power will not take cognizance of the claims of seamen for their wages only in cases of flagrant wrong or suffering on their part, but not upon an alleged breach of contract, much less to decide upon a *quantum meruit*. They should seek redress from their own consul. *Id.*

ACTION, 2, 9, 26.

COLLISION, 28.

MARSHALLING OF CLAIMS, 5.

SURPLUS MONIES, 2.

L

LIBEL AND ANSWER.

1. Where an answer is made without oath, as authorized by Rule 87, it should still respond fully and particularly to every material averment of the libel. *The Brig Aldebaram*, 180

2. Mere narrative statements in a libel, which allege no damages, and claim

no particular remedy, need not be replied to specifically by answer. *Id.*

PRACTICE, 12, 13, 14, 29.

SEAMEN'S WAGES, 2.

LIEN.

1. Compressing cotton in a cotton press is a mere shore business, for the purpose of arranging the bulk for more convenient carriage and stowage. The expense of the work is no lien on the ship upon which the cotton is to be freighted, and an action *in rem* cannot be maintained therefor. *The Bark Joseph Ounard*, 120

2. Neither costs of advertising a vessel for sea, portage nor commissions for procuring freight, wages of stevedores or lightermen, are liens on the ship, suable *in rem*. *Id.*

3. Where no materials are furnished or labor bestowed in the refitment or reparation of vessels, services which are entitled to take the rank and character of maritime are such as are performed in aid of the ship's company or the navigation of the vessel, and are rendered while she is afloat upon tide waters. *The Ship Harriet*, 229

4. A watchman employed on board a domestic vessel is under the State law, entitled to a lien upon her for his services, provided they amount to over fifty dollars, and he may sue therefor in his own name in Admiralty. *Id.*

5. Services rendered in taking care of a ship in port are, under the statutes of the State, protected by a lien upon the ship, unless the claimant shows that less than fifty dollars is due for such service. *The Ship Harvest*, 271

6. The claimant, by not tendering the amount really due, subjects himself to the liability for such amount and costs. *Id.*

7. The mere giving of a promissory note by the debtor for supplies furnished a ship is no satisfaction of the debt, nor is it a waiver of the lien

the creditor may have had therefor.
The Schooner Active, 286

8. Nor will the principle be varied, although the credit was given to the agent, or his note taken for the debt, unless it be proved that the principal had settled with the agent, and his rights would thereby be prejudiced.
Ib.
9. The right of lien for supplies against a foreign vessel rests on the maritime law, and is not affected by local legislation.
Ib.
10. The departure of such vessel from the State before her arrest does not bar the lien or remedy upon it in Admiralty.
Ib.
11. Damages sustained by a charterer of a ship by a breach of the charter contract, in the loss or delay of his voyage, through the negligence or fault of the owner, are a lien upon the vessel; and if a mortgagee satisfies the demand and takes an assignment of the claim, he is entitled to come in upon remnants in Court for repayment. *The Ship Panama*, 343
12. Services or supplies furnished a domestic vessel in her home port, at the request of the master and owner, to fit her out for a foreign voyage, and to be paid for on her return to her home port, acquire no lien or privilege upon the ship under the act of this State. (2 R. S. 406, § 2.) They are personal credits to the parties. Such debts, accordingly, have no privilege of payment as against remnants in Court. *Remnants in Court*, 382
13. A steamboat employed upon a ferry between the city of New-York and Bull's Ferry and Fort Lee, in New-Jersey, is a ship or vessel subject to a lien under the act of the State of New-York. (2 R. S. 493.) *The Steamboat Joseph E. Coffey*, 401
14. Such vessel does not depart from the State within the meaning of the statute, so as to destroy the liens, by going from this port to the above places in New-Jersey and back again to New-York, on Sunday, whilst her repairs are in progress and before they are completed. *Ib.*
15. The lien given by the act will not be lost or defeated by the vessel leaving the State fraudulently or clandestinely, at a time when the lien creditor could not legally arrest her.
Ib.
16. Nor if she makes her departure on Sunday, or whilst the contract for labor, &c., upon her is in progress of execution and not finished. *Ib.*
17. A tacit lien is lost, or will be deemed waived by unreasonable delay in enforcing it. It will not be upheld in prejudice of an innocent purchaser in favor of a party who seeks to enforce it inequitably. *The Scow Bel's war*, 474
18. In many systems of jurisprudence secret liens are limited by positive law. They are rejected as stale in all others, when unreasonably delayed or concealed against good conscience and fair dealing. *Ib.*
19. A mariner has a lien for wages, earned on board a sailing vessel of fifty tons burthen, employed in the transportation of merchandise on tide waters upon the Hudson River within the territory of the State. *The Scow Bolisar*, 480
20. This lien can be enforced against the vessel in the hands of a bona fide purchaser of her, if she was sold without the knowledge of the seaman, and he pursues his claim at the first opportunity after his debt has accrued. *Ib.*

COMMON CARRIER, 14.
SEAMEN'S WAGES, 6, 6, 7.

LONG ISLAND SOUND.

Long Island Sound is not only, in common law acceptation, an arm of the sea; it is a strait and parcel of the high seas; it is not within the territorial limits of any particular State. *The Sloop Martha Anne*, 18

M

MARSHALLING OF CLAIMS.

1. Between two contending hypothecations, the later one, as a general rule, is entitled to priority of payment out of the vessel. *Furniss v. The Brig Magoun*, 55
2. The rule in respect to the proceeds is the same as against the vessel itself. *Ib.*
3. Seamen's wages, in this case, entitled to priority of payment out of the proceeds of the vessel, over the lien of libellants. *Ib.*
4. A mortgage debt against a ship will, in marshalling her proceeds for distribution, be entitled, after satisfaction of privileged and lien debts, to payment as against the owner. *Remnants in Court*, 382
5. *Quere.* Whether the Court can take cognizance of debts of the ship-owner which do not possess maritime privileges and apply a distributive part of remnants in the registry to them! *Ib.*

MASTER

1. If part of the cargo be sold in a foreign port by the master to supply the necessities of the ship, the owner of it may be entitled, in case the ship or owners cannot satisfy his demand, to proceed against other owners of cargo to contribute, in proportion to their respective interests, towards his indemnity. *The Schooner Leonidas*, 22
2. Conditions preceding the authority of a master to hypothecate his vessel in a foreign port by bottomry. *Furniss v. The Brig Magoun*, 55
3. Where the master of a ship drew a bill of exchange upon the owners in favor of the agent of the charterer, for disbursements and expenses, the drawee having notice that the master was instructed by the owners not to draw such bills, and the drawee afterwards negotiated the bill to the libel-

lants, held, that on the facts the debt for which the bill was drawn was no lien upon the ship, and that the holders could not maintain an action *in rem* upon it, or stand in a better situation than their endorser. *The Bark Joseph Ounard*, 120

4. The master of a vessel cannot bind his owners for repairs or supplies to her when some other person is authorized to manage the business of the ship in that respect, and that fact is known to the creditor. *Ib.*

ACTION, 21.
COLLISION, 29, 33.
COMMON CARRIER, 4, 14, 17, 19.
EVIDENCE, 1, 3, 15, 26.
SEAMEN, 2, 4.
SEAMEN'S WAGES, 7.
URAGE, 2, 3, 4.

MATE

1. Where the mate, upon the decease of the master, succeeds to the command of the vessel, he cannot sue, *in rem*, for the extra compensation he thus becomes entitled to as acting master. *The Schooner Leonidas*, 12
2. According to the English and American cases, the mate must sue in the Admiralty as *mate*. His claim for services as *temporary master*, either demanded as additional wages or as a *quantum meruit*, must be agitated elsewhere. By the well-settled rule in Admiralty, the master of a ship is entitled only to an action *in personam* for the recovery of compensation for his services. *Ib.*

MORTGAGE

TITLE TO VESSELS, 1, 2, 3, 4, 5, 6, 7, 9.

N

NEGLIGENCE.

1. A cargo of raw hides is liable to speedy deterioration from worms and the confined heat of the vessel in a



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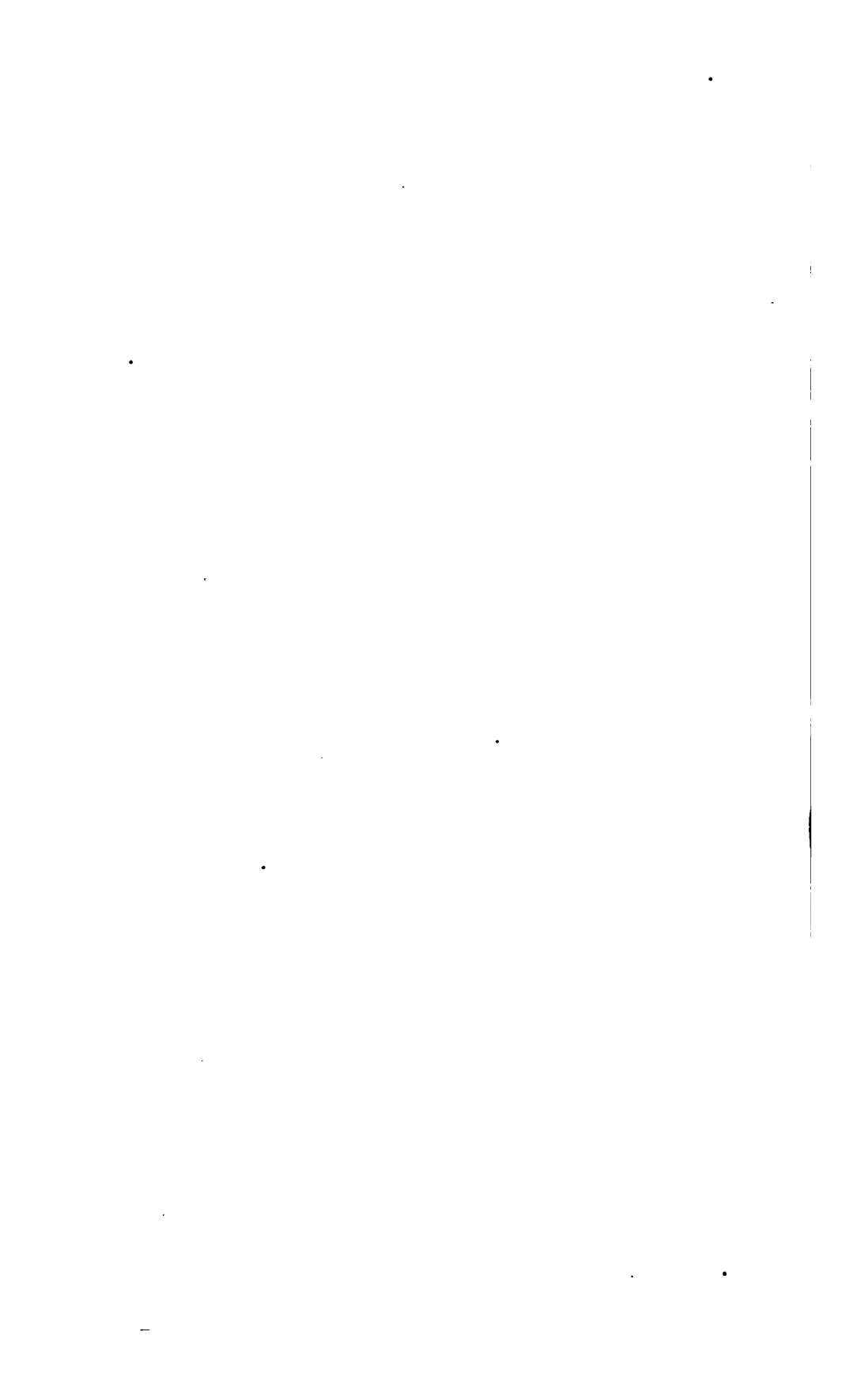
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